

IN THE United States District Court
For THE District of Delaware

Michael Durham
Petitioner,

C.R. No. 0208019524

07-370

v.

Thomas Carroll,
Respondent,



SP scanned

ON Appeal From THE Supreme Court of THE
STATE of Delaware IN AND FOR Delaware

THIS is Respondent Appendix to his opening
BRIEF IN Appeal of THE Supreme Court order

THIS is Appellants Appendix to his opening brief
IN Appeal of THE Supreme Court

Date 5-30-07

Michael Durham
Michael Durham
S.B.I. # 161286
Del. Corr. Center
1181 Paddock Rd
Smyma, DE. 19987

TABLE OF CONTENTS TO APPENDIX

Page. 0.[#]

Superior Court Criminal docket sheet in
case durham v. State, as of 9-24-04.

A- 1. [#]

Superior Court Indictment, in case
State v. Durham, ~~and State~~

A- 7. [#]

Record and letter, by counsel to defendant
of "all" information given by counsel.

A- 15. [#]

Police Report in case, Durham v. State, by
detective humphrey.

A- 16. [#]

Arrest warrant from J.P. Court 7.[#] in
case, Durham v. State.

A- 18. [#]

Affidavit of Prior Counsel, in response to
defendants, Superior Ct. R. 61. motion.

A- 21. [#]

The States, Memorandum of law in response
to defendants, Superior Ct. R. 61. motion.

A- 36. [#]

Response of Disciplinary Complaint, filed by
the defendant against prior counsel.

A- 47. [#]

The Motion for a new trial, filed by prior counsel
in the superior court, do to juror 9. error.

A- 48. [#]

The States, Memorandum of law in Opposition
to the motion for a new trial, filed do to juror 9.[#] error.

A- 52. [#]

CONTINUED • TABLE OF CONTENTS TO APPENDIX.Page O.[#]

Defendants exculpatory witness,
Trial Testimony of Quentin Henry, witness.

A-62.[#]

Perjured Testimony, and Trial testimony of
Detective Carl Humphrey.

A-77.[#]

Hearing on motion for a new trial, testimony
of juror 9, "Shirley Riley" whom was asleep.

A-85.[#]

Hearing on motion for a new trial, testimony
of witness to juror 9, error, "Beth Savitz".

A-97.[#]

Hearing on motion for a new trial testimony
of Correctional officer "Leroy Poore".

A-103.[#]

Hearing on motion for a new trial testimony
of witness to juror 9, error, "William Mizell".

A-109.[#]

Hearing on motion for a new trial, testimony
of bailiff, after hearing closed and reopened, "Joseph Sanchez".

A-114.[#]

All of prior counsels grounds raised on defendants
direct appeal, which is cause to excuse Any bar.

A-115.[#]

Trial testimony of trial testimony of states witness
taylor. Identification.

A-116.[#]Page O.[#]

SUPERIOR COURT CRIMINAL DOCKET
(as of 09/02/2004)

Page 1

State of Delaware v. MICHAEL DURHAM
 State's Atty: JAMES J KRINER , Esq.
 Defense Atty: SANDRA W DEAN , Esq.

DOB: 10/13/1965
 AKA: MICHAEL D DURHAM
 MICHAEL D DURHAM

Co-Defendants: QUINTON HENRY , MICHAEL DURHAM
 Co-Defendants: QUINTON HENRY , QUINTON HENRY

Assigned Judge:

Charges:

Count	DUC#	Crim.Action#	Description	Dispo.	Dispo. Date
001	0208019524A	IK02090233	PFDCF	TG	12/04/2003
002	0208019524A	IK02090234	ATT ROBBERY 1ST	TG	12/04/2003
003	0208019524A	IK02090235	BURGLARY 1ST	TG	12/04/2003
004	0208019524A	IK02090236	PDWBPP	SEV	12/04/2003
005	0208019524A	IK02090237	RECK END 1ST	TG	12/04/2003
006	0208019524A	IK02090238	CONSP 2ND	TG	12/04/2003
007	0208019524A	IK02090239	TERROR THREAT	TG	12/04/2003
008	0208019524A	IK02090240	ASSAULT 3RD	NOLP	01/07/2004
009	0208019524A	IK02090241	ENDANG WLF CHLD	TNG	04/10/2003
010	0208019524A	IK02090242	ENDANG WLF CHLD	TNG	04/10/2003
011	0208019524A	IK02090243	CRIM MISC <1000	TG	12/04/2003
012	0208019524A	IK02110100	PFDCF	TG	12/04/2003
013	0208019524A	IK02110101	PFDCF	TG	12/04/2003
4	0208019524A	IK02110102	ASSAULT 3RD	TGLI	12/04/2003
015	0208019524A	IK02110103	END WELF CHILD	TG	12/04/2003
016	0208019524A	IK02110104	KIDNAP 1ST	ACQT	04/08/2003
017	0208019524A	IK02110105	PFDCF	ACQT	04/08/2003
018	0208019524A	IK02110106	AGGR MENACING	TG	12/04/2003
019	0208019524A	IK02110107	PFDCF	TG	12/04/2003
020	0208019524A	IK02090245	OFF TOUCHING	TG	04/10/2003
021	0208019524A	IK02110118	CRIM TRES 2ND	TG	04/10/2003

No.	Event Date	Event	Judge
1	09/09/2002	CASE ACCEPTED IN SUPERIOR COURT. ARREST DATE: 08/28/2002 PRELIMINARY HEARING DATE: 09/06/2002 BAIL: SECURED BAIL-HELD	25,000.00
2	11/04/2002	INDICTMENT, TRUE BILL FILED.	
3	11/06/2002	CASE CONSOLIDATED WITH: 0208019537	
4	11/07/2002	SUMMONS MAILED TO DEFENDANT AND BONDSPERSON FOR APPEARANCE IN COURT ON	

A-1

SUPERIOR COURT CRIMINAL DOCKET
(as of 09/02/2004)

Page 2

State of Delaware v. MICHAEL DURHAM
 State's Atty: JAMES J KRINER, Esq.
 Defense Atty: SANDRA W DEAN, Esq.

DOB: 10/13/1965
 AKA: MICHAEL D DURHAM
 MICHAEL D DURHAM

No.	Event Date	Event	Judge
	11/14/2002	FOR ARRAIGNMENT.	
5	11/14/2002	ARRAIGNMENT CALENDAR - 10-B BY VIDEO - DEFENDANT WAIVED READING, PLEAD NOT GUILTY, JURY TRIAL DEMANDED	FREUD ANDREA MAYBEE
6	11/25/2002	CASE REVIEW CALENDAR: SET FOR FINAL CASE REVIEW 1/2 & TRIAL 1/6/03.	VAUGHN JAMES T. JR.
7	12/03/2002	MOTION TO SEVER FILED. (DEAN)	
8	12/06/2002	MOTION TO SEVER GRANTED. IK02-09-0236 IS SEVERED.	RIDGELY HENRY DUPONT
9	12/11/2002	SUBPOENA(S) ISSUED.	
10	12/26/2002	SUBPOENA(S) ISSUED.	
11	12/31/2002	CONTINUANCE REQUEST FILED BY JAMES KRINER, ESQ.; GRANTED BY JUDGE WITHAM; REMAIN ON FOR FCR AND ADDRESS TRIAL DATE AT FCR.	WITHAM WILLIAM L. JR.
12	01/02/2003	CASE REVIEW CALENDAR FINAL CASE REV. CONT. 2/12/03, TRIAL 2/18/03	WITHAM WILLIAM L. JR.
13	01/03/2003	PROSECUTION REQUEST - AWAITING LAB RESULTS.	
14	01/14/2003	NOTICE OF SERVICE - DISCOVERY RESPONSE.	
15	02/06/2003	CONTINUANCE REQUEST FILED BY SANDRA DEAN, ESQ.; GRANTED BY JUDGE WITHAM; REMAIN ON FCR: 2/12/03 CON'T TRIAL 1 DAY 2/19/03	WITHAM WILLIAM L. JR.
16	02/12/2003	ATTY VACATION	
17	02/19/2003	SUBPOENA(S) ISSUED.	
18	02/21/2003	FINAL CASE REVIEW CALENDAR: SET FOR CONTROL 021803	VAUGHN JAMES T. JR.
19	03/10/2003	FCR 031203	
20	03/11/2003	TR 031703	
21	03/12/2003	TRIAL CALENDAR/CONTROL: DEFENDANT SCHEDULED FOR FCR 03/12/03;	VAUGHN JAMES T. JR.
		TRIAL 03/17/03	
		NOTICE OF SERVICE - DISCOVERY RESPONSE.	
		NOTICE OF SERVICE - DISCOVERY RESPONSE.	
		SUBPOENA(S) ISSUED.	
			RIDGELY HENRY DUPONT

A-2

SUPERIOR COURT CRIMINAL DOCKET
(as of 09/02/2004)

Page 3

State of Delaware v. MICHAEL DURHAM
 State's Atty: JAMES J KRINER , Esq.
 Defense Atty: SANDRA W DEAN , Esq.

DOB: 10/13/1965
 AKA: MICHAEL D DURHAM
 MICHAEL D DURHAM

No.	Event Date	Event	Judge
22	03/17/2003	FINAL CASE REVIEW: NO PLEA/SET FOR TRIAL 03/17/03. TRIAL CALENDAR-JURY TRIAL-CONTINUED TO FCR 04/02/03; TRIAL 04/07/03. COURT'S REQUEST-LACK OF JUDGES.	VAUGHN JAMES T. JR.
23	03/20/2003	SUBPOENA(S) ISSUED.	
24	03/20/2003	LETTER FROM SANDRA DEAN, ESQ TO JUDGE WITHAM RE: THAT THIS CASE BE THE HIGHEST PRIORITY FOR TRIAL ON APRIL 7, 2003. APPROVED.	WITHAM WILLIAM L. JR.
25	04/02/2003	FINAL CASE REVIEW: NO PLEA/SET FOR TRIAL 4/7/03	RIDGELY HENRY DUPONT
26	04/07/2003	TRIAL CALENDAR- WENT TO TRIAL JURY	WITHAM WILLIAM L. JR.
27	04/10/2003	JURY TRIAL HELD 4/7, 4/8, 4/9, 4/10/03. JURY FOUND THE DEFENDANT NOT GUILTY ON IK02-09-0241; 0242. JURY FOUND THE DEFENDANT GUILTY ON IK02-11-0118 AND IK02-09-0245. MOTION FOR JUDGMENT OF ACQUITTAL ON COUNTS 1,2,3,4,6,7,10,11,12,19 & 20 WERE DENIED. ON COUNTS 14 & 15 THE MOTION FOR JUDGMENT OF ACQUITTAL WAS GRANTED. JURY COULD NOT AGREE ON THE REST OF THE CHARGES STILL OPEN. THESE CHARGES ARE RESCHEDULED FOR FCR 5/28, TRIAL 6/2/03. S/J. KRINER D/S. DEAN CR/S. DOUGHTERY 4/7 AND 4/10, CR/V. CLINE 4/8, 4/9 CC/B. HOLCOMB 4/7, 4/8, 4/9, 4/10 JOSEPH SANCHEZ (BALIFF) SWORN BY CC/B.HOLCOMB ON 4/10/03. HE REPLACED MICHAEL NOBLE (BALIFF).	RIDGELY HENRY DUPONT
28	04/16/2003	MOTION FOR REDUCTION OF BAIL FILED. FILED BY SANDRA DEAN.	FREUD ANDREA MAYBEE
29	04/22/2003	TRANSCRIPT OF TRIAL FILED. APRIL 8, 2003 VENDITA CLINE, OFFICIAL COURT REPORTER	
30	04/24/2003	MOTION FOR REDUCTION OF BAIL DENIED.	FREUD ANDREA MAYBEE
31	05/12/2003	CONTINUANCE REQUEST FILED BY SANDRA DEAN, ESQ.; GRANTED BY JUDGE VAUGHN; COUNSEL NEEDS TIME TO PREPARE PLOOF; MOVE FCR TO 5/14/03. ADDRESS TRIAL DATE AT FCR.	VAUGHN JAMES T. JR.
32	05/15/2003	TRANSCRIPT OF EXCERPT OF TRIAL FILED. (VOL A) (DOUGHERTY) (THIS TRANSCRIPT ORIGINALLY DOCKETED UNDER "B" IN ERROR)	
33	06/20/2003	CONTINUANCE REQUEST GRANTED BY JUDGE VAUGHN IN OFFICE CONFERENCE	VAUGHN JAMES T. JR.

A3

SUPERIOR COURT CRIMINAL DOCKET
(as of 09/02/2004)

Page 4

State of Delaware v. MICHAEL DURHAM
 State's Atty: JAMES J KRINER , Esq.
 Defense Atty: SANDRA W DEAN , Esq.

DOB: 10/13/1965
 AKA: MICHAEL D DURHAM
 MICHAEL D DURHAM

No.	Date	Event	Judge
		TO AG BEING IN MURDER TRIAL. NEW DATES: FCR 9/10 TRIAL 9/15/03	
34	06/25/2003	SUBPOENA(S) ISSUED.	
35	08/11/2003	LETTER FROM PARALEGAL OFFICE TO SANDRA W. DEAN, ESQUIRE RE: ATTACHED IS A CORRESPONDENCE FROM DEFENDANT.	
36	08/29/2003	SUBPOENA(S) ISSUED.	
37	09/10/2003	CASE REVIEW CALENDAR FINAL CASE REVIEW CONTINUED. COURT'S REQUEST-SIDEBAR DECISION. FCR 10/29, TRIAL 11/04/03.	RIDGELY HENRY DUPONT
38	10/16/2003	SUBPOENA(S) ISSUED.	
39	10/29/2003	FINAL CASE REVIEW: NO PLEA/SET FOR TRIAL 11/04/03.	VAUGHN JAMES T. JR.
40	11/04/2003	TRIAL CALENDAR-JURY TRIAL-CONTINUED. PROSECUTION REQUEST. DAG IN TRIAL. FCR 112603 TR 120103	VAUGHN JAMES T. JR.
41	11/14/2003	SUBPOENA(S) ISSUED.	
42	11/26/2003	FINAL CASE REVIEW: NO PLEA/SET FOR TRIAL	VAUGHN JAMES T. JR.
43	12/01/2003	TRIAL CALENDAR- WENT TO TRIAL JURY	RIDGELY HENRY DUPONT
44	12/03/2003	CHARGE TO THE JURY FILED.	RIDGELY HENRY DUPONT
45	12/04/2003	JURY TRIAL HELD. 120103 THROUGH 120403. STATE-J. KRINER, DEFENSE-S. DEAN, CR-12-01 J. WASHINGTON, 12-02 S. DOUGHERTY, 12-03 C. QUINN, 12-04 J. WASHINGTON & C. QUINN (VERDICT), CC-M. JORDAN JURY FOUND THE DEF GUILTY AS CHARGED EXCEPT ASSAULT 2ND THEY FOUND THE DEFENDANT GUILTY OF THE LESSER INCLUDED ASSAULT 3RD. VERDICT TAKEN BY JUDGE VAUGHN AND SENTENCING WAS DEFERRED TO JUDGE RIDGELY. DEFENDANT'S BAIL IS REVOKED.	RIDGELY HENRY DUPONT
46	12/05/2003	ORDER: A PRESENTENCE INVESTIGATION IS ORDERED IN THIS CASE. SENTENCING IS SCHEDULED FOR FEBRUARY 24, 2004.	RIDGELY HENRY DUPONT
47	12/09/2003	MOTION TO DECLARE DEFENDANT AN HABITUAL OFFENDER FILED BY JAMES KRINER	

A-4

SUPERIOR COURT CRIMINAL DOCKET
(as of 09/02/2004)

Page 5

State of Delaware v. MICHAEL DURHAM
 State's Atty: JAMES J KRINER , Esq.
 Defense Atty: SANDRA W DEAN , Esq.

DOB: 10/13/1965
 AKA: MICHAEL D DURHAM
 MICHAEL D DURHAM

No.	Date	Event	Judge
48	12/11/2003	MOTION FOR A NEW TRIAL FILED BY SANDRA DEAN, ESQ.	
49	12/30/2003	OFFICE CONFERENCE PROCEEDING HELD. EVIDENTIARY HEARING SCHEDULED 1/9/04 AT 2:30 P.M. SUBPOENAS TO BE ISSUED FOR HEARING TO BETH SAVITZ LEROY POORE, WILLIAM MIZELL, JUROR #9, AND DEFENDANT, MICHAEL DURHAM. PRESENT AT THE OFFICE CONFERENCE WERE JAMES KRINER/AG SANDRA DEAN/PD SHEILA DOUGHERTY/CR B. HOLCOMB/CC	RIDGELY HENRY DUPONT
50	01/07/2004	NOLLE PROSEQUI FILED BY ATTORNEY GENERAL, J. KRINER ON IK02-09-0240..	
51	01/09/2004	EVIDENTIARY HEARING HELD. DEFENSE AND STATE TO SUBMIT WRITTEN ARGUMENTS. DEFENSE BY JAN. 16, 2004, STATE TO RESPONSE BY JAN. 30, 2004, DEFENSE REPLY BY FEB. 6, 2004.	RIDGELY HENRY DUPONT
52	01/14/2004	DEFENDANT'S LETTER MEMORANDUM FILED IN SUPPORT OF HIS MOTION FOR A NEW TRIAL.	
53	01/28/2004	TRANSCRIPT FILED OF EVIDENTIARY HEARING - FRIDAY, JANUARY 9, 2004 BY WASHINGTON	RIDGELY HENRY DUPONT
54	01/30/2004	STATE'S MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANT'S MOTION FOR NEW TRIAL. (J. KRINER)	
55	03/08/2004	MOTION FOR NEW TRIAL DENIED.	RIDGELY HENRY DUPONT
56	03/09/2004	SENTENCING CALENDAR: DEFENDANT SENTENCED.	RIDGELY HENRY DUPONT
57	04/28/2004	MOTION FOR RESENTENCING FILED (S. DEAN).	
58	05/13/2004	ORDER: IT IS SO ORDERED THAT THE DEFENDANT MICHAEL DURHAM, BE SCHEDULED FOR A RESENTENCING OF HIS CASE. NOTE: SCHEDULED FOR 5/25/2004.	RIDGELY HENRY DUPONT
59	05/25/2004	SENTENCING CALENDAR: DEFENDANT SENTENCED.	RIDGELY HENRY DUPONT
60	05/28/2004	NOTICE OF APPEAL 227, 2004→	
61	05/28/2004	DIRECTIONS TO COURT REPORTER FOR TRANSCRIPT DUE NO LATER THAN 7/8/04.→	
62	07/02/2004	TRANSCRIPT OF TRIAL FILED. (VOL B) (S. DOUGHERTY)	
63	07/02/2004		

SUPERIOR COURT CRIMINAL DOCKET
(as of 09/02/2004)

Page 5

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50	01/07/2004	NOLLE PROSEQUI FILED BY ATTORNEY GENERAL, J. KRINER ON IK02-09-0240.	
51	01/09/2004	EVIDENTIARY HEARING HELD. DEFENSE AND STATE TO SUBMIT WRITTEN ARGUMENTS. DEFENSE BY JAN. 16, 2004, STATE TO RESPONSE BY JAN. 30, 2004, DEFENSE REPLY BY FEB. 6, 2004.	RIDGELY HENRY DUPONT
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60	05/28/2004	NOTICE OF APPEAL 227, 2004	
61	05/28/2004	DIRECTIONS TO COURT REPORTER FOR TRANSCRIPT DUE NO LATER THAN 7/8/04.	
62	07/02/2004	TRANSCRIPT OF TRIAL FILED. (VOL B) (S. DOUGHERTY)	
63	07/02/2004		

A-5

SUPERIOR COURT CRIMINAL DOCKET
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Page 6

State of Delaware v. MICHAEL DURHAM
 State's Atty: JAMES J KRINER , Esq.
 Defense Atty: SANDRA W DEAN , Esq.

DOB: 10/13/1965
 AKA: MICHAEL D DURHAM
 MICHAEL D DURHAM

No.	Date	Event	Judge
		MOTION FOR APPOINTMENT OF COUNSEL FILED (PRO SE).	
64	07/02/2004	- MOTION FOR POSTCONVICTION RELIEF FILED (PRO SE).	
65	07/09/2004	LETTER FROM CHRISTINE L. QUINN, COURT REPORTER TO CATHY HOWARD, SUPREME COURT RE: EXTENSION TO FILE TRANSCRIPT	
66	07/13/2004	LETTER FROM SUPREME COURT TO CHRISTINE L. QUINN RE: REQUEST FOR EXTENSION GRANTED - TRANSCRIPT IS DUE TO BE FILED NO LATER THAN AUGUST 9, 2004.	
67	08/06/2004	LETTER FROM CATHY HOWARD, SUPREME COURT, TO JENNIE WASHINGTON, COURT REPORTER RE: YOUR REQUEST FOR AN EXTENSION OF TIME IS GRANTED. TRANSCRIPT IS DUE NO LATER THAN SEPTEMBER 8, 2004.	
68	08/06/2004	TRANSCRIPT OF VERDICT FILED. VOLUME DD (C. QUINN)	
69	08/06/2004	TRANSCRIPT OF TRIAL FILED - VOLUME C (C. QUINN)	
70	08/06/2004	TRANSCRIPT OF SENTENCING FILED. (C. QUINN)	
71	08/09/2004	LETTER FROM JENNIE WASHINGTON, CHIEF COURT REPORTER TO SUPREME COURT RE: REQUESTING EXTENSION FOR 30 DAYS	
72	08/09/2004	LETTER FROM SUPREME COURT TO JENNIE WASHINGTON RE: EXTENSION OF TIME TO FILE TRANSCRIPT IS GRANTED. TRANSCRIPT DUE TO BE FILED NO LATER THAN SEPTEMBER 8, 2004.	
73	08/16/2004	NOTICE OF NON-COMPLIANCE TO RULE 61 (MOTION FOR POSTCONVICTION RELIEF) SENT TO DEFENDANT. IT IS SO ORDERED 8/13/2004.	VAUGHN JAMES T. JR.
74	08/26/2004	TRANSCRIPT OF TRIAL FILED. (VOL A) (WASHINGTON)	
75	08/26/2004	TRANSCRIPT OF TRIAL FILED. (VOL D) (WASHINGTON)	
76	09/02/2004	LETTER FROM SUPREME COURT STATING RECORD IS DUE NO LATER THAN 9/7/04.	

*** END OF DOCKET LISTING AS OF 09/02/2004 ***
 PRINTED BY: CSCRMAN

CERTIFIED
 AS A TRUE COPY 9/2/04
 ATTEST LISA M. LOWMAN, PROTHONOTARY
 BY: Rebecca S. Manchester

SUPERIOR COURT CRIMINAL DOCKET
(as of 09/02/2004)

Page 6

State of Delaware v. MICHAEL DURHAM
 State's Atty: JAMES J KRINER , Esq.
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66	07/13/2004	LETTER FROM SUPREME COURT TO CHRISTINE L. QUINN RE: REQUEST FOR EXTENSION GRANTED - TRANSCRIPT IS DUE TO BE FILED NO LATER THAN AUGUST 9, 2004.	
67	08/06/2004	LETTER FROM CATHY HOWARD, SUPREME COURT, TO JENNIE WASHINGTON, COURT REPORTER RE: YOUR REQUEST FOR AN EXTENSION OF TIME IS GRANTED. TRANSCRIPT IS DUE NO LATER THAN SEPTEMBER 8, 2004.	
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70	08/06/2004	TRANSCRIPT OF SENTENCING FILED. (C. QUINN)	
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73	08/16/2004	NOTICE OF NON-COMPLIANCE TO RULE 61 (MOTION FOR POSTCONVICTION RELIEF) SENT TO DEFENDANT. IT IS SO ORDERED 8/13/2004.	VAUGHN JAMES T. JR.
74	08/26/2004	TRANSCRIPT OF TRIAL FILED. (VOL A) (WASHINGTON)	
75	08/26/2004	TRANSCRIPT OF TRIAL FILED. (VOL D) (WASHINGTON)	
76	09/02/2004	LETTER FROM SUPREME COURT STATING RECORD IS DUE NO LATER THAN 9/7/04.	

*** END OF DOCKET LISTING AS OF 09/02/2004 ***
 PRINTED BY: CSCRMAN

CERTIFIED
 AS A TRUE COPY 9/2/04
 ATTEST LISA M. LOWMAN, PROTHONOTARY
 BY Lisa M. Lowman

A-6

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE STATE OF DELAWARE : ID NO 0208019524(Durham)
0208019537(Durham)
-0208019532(Henry)

vs. : INDICTMENT BY THE

MICHAEL DURHAM and
QUINTON HENRY : GRAND JURY

The Grand Jury charges MICHAEL DURHAM and QUINTON HENRY with the following offenses:

COUNT 1

IK-02-09-0233(Durham)
IK-02-10-0196 (Henry)

POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY a
felony, in violation of Title 11, Section 1447 A of the Delaware Code of 1974, as amended.

MICHAEL DURHAM and Quinton Henry on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did knowingly possess a firearm during the commission of a felony by possessing a firearm during the commission of Burglary First Degree as set forth in Count 2 of the Indictment which is herein incorporated by reference.

A-7

212L
312L
512L

COUNT 2

IK-02-09-0235 (Durham)

IK-02-10-0194 (Henry)

BURGLARY FIRST DEGREE, a felony, in violation of Title 11, Section 826 of the Delaware Code of 1974, as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did, knowingly and unlawfully enter and/or remain in a dwelling at night, located at 34 Heritage Drive, Dover, Delaware, with the intent to commit the crime of Theft therein, and was armed with a deadly weapon and did cause physical injury to a person not a participant in the crime.

COUNT 3

IK-02-11-0100 (Durham)

IK-02-11-0112 (Henry)

POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, a felony, in violation of Title 11, Section 1447 A of the Delaware Code of 1974, as amended.

MICHAEL DURHAM and Quinton Henry on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did knowingly possess a firearm during the commission of a felony by possessing a firearm during the commission of Attempted Robbery First Degree as set forth in Count 4 of the Indictment which is herein incorporated by reference.

COUNT 4

1 K-02-09-0234 (Durham)

1 K-02-10-0195 (Henry)

ATTEMPTED ROBBERY FIRST DEGREE, a felony, in violation of Title 11, Section 0531 of the Delaware Code of 1974, as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, in an attempt to commit theft, did use force or did threaten to use immediate force upon Michael Taylor to compel him to deliver up property and when in the course of the commission of the crime he did display what appeared to be a deadly weapon and did cause physical injury to another who was not a participant in the crime; and did those acts which, under circumstances as he believed them to be, was a substantial step in a course of conduct planned to culminate in the commission of the crime by him.

COUNT 5

1 K-02-09-0236 (Durham)

POSSESSION OF A DEADLY WEAPON BY A PERSON PROHIBITED, a felony, in violation of Title 11, Section 1448 of the Delaware Code of 1974 as amended.

MICHAEL DURHAM on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did knowingly have in his possession a handgun, a deadly weapon, as defined under 11 Del. C. §222(5) after having pled guilty of the felony of Carrying a Concealed Deadly Weapon in Cr A .No. 9910024844 in the Superior Court of the State of Delaware in and for Kent County on December 28, 1999.

COUNT 6

Ⓜ K-02-09-0237(Durham)

Ⓜ K-02-10-0192 (Henry)

RECKLESS ENDANGERING IN THE FIRST DEGREE, a felony, in violation of Title 11, Section 0604 of the Delaware Code of 1974, as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did recklessly engage in conduct which created a substantial risk of death to Michael Taylor by discharging a firearm in his residence.

COUNT 7

Ⓜ K-02-11-0101 (Durham)

Ⓜ K-02-11-0113 (Henry)

POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, a felony, in violation of Title 11, Section 1447 A of the Delaware Code of 1974, as amended.

MICHAEL DURHAM and Quinton Henry on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did knowingly possess a firearm during the commission of a felony by possessing a firearm during the crime of Reckless Endangering in the First Degree as set forth in Count 7, incorporated by reference herein.

COUNT 8

1 K-02-09-0238 (Durham)

1 K-02-10-0191 (Henry)

CONSPIRACY SECOND DEGREE, a felony, in violation of Title 11, Section 0512 of the Delaware Code of 1974, as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, when intending to promote the commission of a felony, did agree with each other, to engage in conduct constituting the felony of Burglary First, and at least one of the conspirators did commit an overt act in furtherance of said conspiracy, by committing Burglary First as set forth in Count 2 of this Indictment which is herein incorporated by reference.

COUNT 9

1 K-02-09-0239 (Durham)

1 K-02-10-0190 (Henry)

TERRORISTIC THREATENING, a misdemeanor, in violation of Title 11, Section 621 of the Delaware Code of 1974 as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did threaten to commit a crime likely to result in death or injury to Michael Taylor.

COUNT 10

1 K-02-11-0102 (Durham)

1 K-02-11-0114 (Henry)

ASSAULT SECOND DEGREE, a felony, in violation of Title 11, Section 612 of the Delaware Code of 1974 as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did intentionally or recklessly cause physical injury to Michael Taylor by striking him about his head with an unknown metal object.

A11

COUNT 11

± K-02-09-0241(Durham)

± K-02-10-0188(Henry)

ENDANGERING THE WELFARE OF A CHILD, a misdemeanor, in violation of Title 11, Section 1102 of the Delaware Code of 1974 as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did commit the crime of Assault Third Degree knowing a child less than 18 years of age, was present in the dwelling at the time.

COUNT 12

± K-02-09-0242 (Durham)

± K-02-10-0197 (Henry)

ENDANGERING THE WELFARE OF A CHILD, a misdemeanor, in violation of Title 11, Section 1102 of the Delaware Code of 1974 as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did commit the crime of Assault Third Degree knowing a child less than 18 years of age, was present in the dwelling at the time.

COUNT 13

± K-02-11-0103 (Durham)

± K-02-11-0115 (Henry)

ENDANGERING THE WELFARE OF A CHILD, a misdemeanor, in violation of Title 11, Section 1102 of the Delaware Code of 1974 as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did commit the crime of Assault Second Degree knowing a child less than 18 years of age, was present in the dwelling at the time.

COUNT 14

± K-02-11-0104 (Durham)

± K-02-11-0117 (Henry)

KIDNAPPING FIRST DEGREE, a felony, in violation of Title 11, Section 783(A), of the Delaware Code of 1974, as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did unlawfully restrain another person to facilitate the commission of a felony, Burglary First Degree, and/or to inflict physical injury upon the victim and did not voluntarily release the victim unharmed prior to trial.

COUNT 15

± K-02-11-0105 (Durham)

± K-02-11-0116 (Henry)

POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, a felony, in violation of Title 11, Section 1447 A of the Delaware Code of 1974, as amended.

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did knowingly possess a firearm during the commission of a felony by possessing a firearm during the of Kidnapping in the First Degree as set forth in Count 15, incorporated by reference herein.

COUNT 16

± K-02-09-0243(Durham)

± K-02-10-0198 (Henry)

CRIMINAL MISCHIEF, a misdemeanor, in violation of Title 11, Section 811 of the Delaware Code of 1974 as amended.,

MICHAEL DURHAM and QUINTON HENRY on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did intentionally cause damage in an amount less than \$1,000.00 to property consisting of a door, lock and jam belonging to another.

COUNT 17

K-02-11-0119 (Durham)

CRIMINAL TRESPASS IN THE SECOND DEGREE, a misdemeanor, in violation of Title 11, Section 0822 of the Delaware Code of 1974, as amended.

MICHAEL DURHAM on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did, at night, knowingly and unlawfully enter and/or remain in a dwelling, located at 1289 Walker Road, Dover, Delaware.

COUNT 18

K-02-09-0245 (Durham)

OFFENSIVE TOUCHING, a misdemeanor, in violation of Title 11, Section 0601 of the Delaware Code of 1974 as amended.

MICHAEL DURHAM on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, did intentionally touch Felicia Batson either with a member of his body or with any instrument knowing that he was thereby likely to cause offense or alarm to her.

COUNT 19

K-02-11-0106 (Durham)

AGGRAVATED MENACING, a felony, in violation of Title 11, Section 0602 of the Delaware Code of 1974, as amended.

MICHAEL DURHAM on or about the 27th day of August, 2002, in the County of Kent, State of Delaware, by displaying what appeared to be a deadly weapon, did intentionally place Michael Taylor in fear or imminent physical injury.



PUBLIC DEFENDER OF THE STATE OF DELAWARE
THE SYKES BUILDING
45 THE GREEN
DOVER, DELAWARE 19901

LAWRENCE M. SULLIVAN
PUBLIC DEFENDER

SANDRA DEAN
ASSISTANT PUBLIC DEFENDER

ANGELO FALASCA
CHIEF DEPUTY

TELEPHONE
(302) 739-4476

March 10, 2004

Michael Durham
SBI# 00161286
Delaware Correctional Center
1181 Smyrna Landing Road
Smyrna, DE 19977

RE: State v. Michael Durham ID# 0208019524A

Dear Mr. Durham:

Enclosed please find copies of the following:

1. Your sentencing order.
2. The Judge's Order in the *Motion for New Trial*.
3. Police Report from your case.

A Notice of Appeal/Directions to the Court Reporter will be filed with the Delaware Supreme Court sometime in the next few weeks. The Appeal process can take a very long time, however, I will keep you informed along the way.

Very truly yours,

A handwritten signature in cursive script that reads "Sandra W. Dean".

SANDRA W. DEAN, ESQUIRE
Assistant Public Defender

SWD/msc

enc.

A-15.[#]

Report Date: 08/27/2002

Agency: Dover PD

File Number: 50-02-020688

Victim - Suspect/Defendant Relationships (Cont'd)

Victim - 001 TAYLOR, MICHAEL	Suspect/Defendant - 001 DURHAM, MICHAEL	Victim Offender Relationship Relationship Undetermined
Victim - 002 TAYLOR, MICHAEL	Suspect/Defendant - 002 HENRY, QUINTON	Victim Offender Relationship Relationship Undetermined

Witness Information

Sequence 01	Type Witness	Name RICHARDSON, CPL	Sex Unknown	Race	Age	D.O.B.
Address		Employer/School				Work Telephone
Sequence 02	Type Witness	Name BERNAT, CHAD	Sex Unknown	Race	Age	D.O.B.
Address		Employer/School				Work Telephone
Sequence 03	Type Witness	Name TURNER, MARKEE	Sex Male	Race Black		
Address		Home Telephone	Employer/School			Work Telephone
Sequence 04	Type Witness	Name BERNA, PFC	Sex Unknown	Race	Age	D.O.B.
Address		Home Telephone	Employer/School			Work Telephone
Sequence 05	Type Witness	Name KNIGHT, PFC	Sex Unknown	Race	Age	D.O.B.
Address		Home Telephone	Employer/School			Work Telephone
Sequence 06	Type Witness	Name TOLSON, KEENA	Sex Female	Race Black	Age	D.O.B.
Address		Home Telephone	Employer/School			Work Telephone
Sequence 07	Type Witness	Name BATSON, FELICIA	Sex Female	Race Black	Age	D.O.B.
Address		Home Telephone	Employer/School			Work Telephone
Sequence 008	Type Witness	Name BECK, NECIA	Sex Female	Race White	Age	D.O.B.
Address		Home Telephone	Employer/School			Work Telephone

Investigative Narrative

ON 08/27/2002 WRITER RESPONDED TO THE ABOVE LOCATION TO INVESTIGATE A REPORTED BURGLARY. WRITER LEARNED THAT AT APPROXIMATELY 2130 HRS THE VIC WAS WALKING FROM THE KITCHEN IN HIS RESIDENCE WHEN THE DEFENDANTS DURHAM, HENRY, AND A THIRD UNKNOWN MALE KICKED OPEN HIS FRONT DOOR AND ENTERED HIS RESIDENCE. THE VICTIM STATED THAT THE MEN WERE ARMED WITH A HANDGUN. ONCE INSIDE THE RESIDENCE, THE SUBJECTS CHASED THE VICTIM THROUGH THE KITCHEN, THROUGH THE DINING ROOM, AND UP THE STAIRS TO THE SECOND FLOOR. AS THE VICTIM WAS CLIMBING THE STAIRS, ONE OF THE SUBJECTS FIRED A SHOT AT HIM, BUT MISSED. W 8 BECK WHO LIVES NEXT DOOR TO THE VICTIM HEARD THE SHOT AND REPORTED IT TO DOVER PD. THE ROUND STRUCK ONE OF THE SPINDALS IN THE STAIR CASE, AND LODGED INTO THE WALL OPPOSITE THE BANNISTER. THE SUBJECTS FOLLOWED THE VICTIM TO THE SECOND FLOOR AND INTO THE BEDROOM OF HIS TWO. VICTIMS SONS ALONG WITH THEIR COUSIN MARKEE TURNER WERE HIDING IN THE ROOM. THE SUBJECTS POINTED THE HANDGUN AT THE VICTIMS HEAD AND DEMANDED MONEY. WHEN THE VICTIM DID NOT RESPOND, THE SUBJECTS BEGAN TO STRIKE HIM ABOUT THE HEAD WITH THE PISTOL. THE THREE BOYS MICHAEL TAYLOR 4 YOA AND AJMERE MATHEWS 10 YOA AND MARKEE TURNED 13 YOA WERE PRESENT IN THE ROOM AT THE TIME AND WITNESSED THE INCIDENT. THE VICTIM STATED THAT HE PLEADED WITH THE SUBJECTS NOT TO DO THIS IF FRONT OF HIS KIDS BUT THEY DID NOT STOP. THE VICTIM STATED THAT WHILE THE SUBJECTS WERE BEATING HIM, THEY WERE TELLING HIM THAT THEY WERE GOING TO SHOOT HIM AND KILL HIM. THE VICTIM WENT ON TO STATE THAT HE MANAGED TO FREE HIMSELF AND RUN DOWN THE STAIRS, AND OUT THROUGH THE FRONT DOOR. HE STATED THAT HE WAS YELLING FOR HELP AND HOPED THAT HIS NEIGHBORS WOULD HEAR HIM. WHILE THE VICTIM WAS OUTSIDE THE SUBJECTS EXITED THE HOUSE AND FLED EAST BOUND FROM THE RESIDENCE. OFFICERS ARRIVED ON THE SCENE SHORTLY

Reporting Officer
DET HUMPHREY - 33641S. Officer Agency
LESTER D BONEY OJDVLDB Date 09/03/2002 0919

08/28/2002

Dover PD

50-01-020633

Investigative Narrative - Continued

AFTER THE SUBJECTS LEFT. THE VICTIM IDENTIFIED THE MICHAEL DURHAM AS AS ONE OF HIS ASSAILANTS, AND PICKED QUINTON HENRY WHO THE VICTIM KNEW AS NUGGET, FROM A PHOTO LINE UP (#4 20688-A). THE VICTIM SUFFERED A CUT TO HIS HEAD AND CONTUSIONS ON HIS SHOULDERS AS A RESULT OF THE BEATING. APPROXIMATELY TEN MINUTES AFTER THE SUBJECTS, THE SUBJECTS FLED FROM 34 HERITAGE DR. DOVER PD RECEIVED A REPORT OF SUBJECTS FIGHTING IN LIBERTY COURT. PFC BERNA WAS ONE OF THE FIRST OFFICERS TO ARRIVE ON THE SCENE. UPON HIS ARRIVAL HE OBSERVED A SUBJECT CARRYING WHAT HE BELIEVED TO BE A HANDGUN FLEE ALONG THE FIRE LANE IN FRONT OF E BUILDING IN LIBERTY COURT. PFC MIGHT ALSO OBSERVED THAT SUBJECT WHO WAS ACCOMPANIED BY ANOTHER MALE FORCE THEIR WAY INTO E-24 LIBERTY COURT. THE TWO SUBJECTS KNOCKED W6 WHO WAS BABY SITTING AT E-24 AND W7 OUT OF THEIR WAS AS THEY ENTERED. OFFICERS PURSUED THE SUBJECTS INTO E-24 AND TOOK WARNER HENRY BM 16 INTO CUSTODY. THEY CONTINUED TO CHECK THE RESIDENCE AND LOCATED MICHAEL DURHAM HIDING IN A BEDROOM. PFC BERNA LOCATED A 9MM SEMIAUTOMATIC PISTOL IN THE KITCHEN OF E-24. THE WEAPON WAS FOUND TO BE LOADED AND COCKED. THE WEAPON WAS CLEARED AND ONE 9MM ROUND WAS RECOVERED FROM IT. WRITER AND DET BERNAT PHOTOGRAPHED THE SCENE AT 34 HERITAGE DR. WRITER RECOVERED 9MM SHELL CASING, AND A SPENT ROUND FROM 34 HERITAGE DR. THE SHELL CASING WAS THE SAME MAKE AS THE ROUND RECOVERED FROM THE WEAPON FROM E-24. THE PISTOL, THE ROUND RECOVERED FROM IT, THE EMPTY SHELL CASING AND THE SPENT ROUND, WERE COLLECTED AND TOT DET VIRDIN FOR COMPARISON BY THE ATF. DURHAM WAS PROCESSED AND ARRAIGNED AT JP 7, WARRANTS WERE OBTAINED FOR QUINTON HENRY, AND WARNER HENRY GAVE A FALSE NAME AND WAS ARRESTED UNDER HIS BROTHERS NAME BRUCHETTE HENRY. WARNER HENRY WHO IS 16 YEARS OLD WAS COMMITTED TO DCC AS AN ADULT UNDER THE FALSE NAME WHICH HE PROVIDED. ON 08 28/02, SBI RAN THE PRINTS AND DISCOVERED THAT THE FINGER PRINTS DID NOT MATCH THE NAME THAT THE DEFENDANT PROVIDED. SBI NOTIFIED DOVER PD OF THE IMPERSONATION AND WRITER NOTIFIED DCC. WARNER HENRY WAS IMMEDIATELY REMOVED FROM DCC AND TRANSPORTED BACK TO DOVER PD WHERE HE WAS TOT DSP TROOP 3 FOR PENDING CHARGES. HE WAS COMMITTED TO STEVENSON HOUSE IN MILFORD IN DEFAULT OF SECURED BOND. HE WAS CHARGED BY WRITER UNDER HIS OWN NAME. FOR ADDITIONAL INFORMATION ON THE LIBERTY COURT INCIDENT, REFER TO DOVER PD COMPLAINT NUMBER 50-02-20690.

Reporting Officer DET HUMPHREY - 3364 I	Supervisor Approval LESTER D BONEY OJDVLDB Date 09/03/2002 0919
Officer Notified	Referred To Dover PD - Victim Services
Scheduling Factors	Witness
	Suspect Located
	M.O.
	Suspect Described
	Trace Broken Property
	Suspect Identified
	Suspect Named
	Suspect Vehicle Identified
	Status Closed

A-17#

State of Delaware vs. MICHAEL DURHAM

Case: 02 08 019524

Exhibit B

SBI Number: 00161286

Also Known As: MICHAEL DURHAM

Date of Birth/Age: Oct 13, 1965 36

Sex: Male

Race: Black

Eye Color:

Hair Color:

Height:

Weight:

Date and Times of Offense: 8/27/2002 at 2140

Location of Offense: 34 Heritage DR - Dover, 19904

Your affiant DET HUMPHREY can truly state that: ON 08/27/2002 WRITER RESPONDED TO THE ABOVE LOCATION TO INVESTIGATE A REPORTED BURGLARY. WRITER LEARNED THAT AT APPROXIMATELY 2130 HRS THE VIC WAS WALKING FROM HIS KITCHEN IN HIS RESIDENCE WHEN THE DEFENDANTS DURHAM, HENRY, AND A THIRD UNKNOWN MALE KICKED OPEN HIS FRONT DOOR AND ENTERED HIS RESIDENCE ARMED WITH A HANDGUN. ONCE INSIDE, THE SUBJECTS CHASED HIM THROUGH THE HOUSE AND HE FLED TO THE SECOND FLOOR. AS THE VICTIM WAS CLIMBING THE STAIRS, THE SUBJECTS FIRED A SHOT AT HIM, BUT MISSED. THE SUBJECTS FOLLOWED THE VICTIM TO THE SECOND FLOOR AND INTO THE BEDROOM OF HIS TWO SONS. THE SUBJECTS POINTED THE HANDGUN AT THE VICTIMS HEAD AND DEMANDED MONEY. WHEN THE VIC DID NOT RESPOND, THE SUBJECTS BEGAN TO STRIKE HIM ABOUT THE HEAD WITH THE PISTOL. THE VICTIMS SONS MICHAEL TAYLOR 4 YOA AND AJMERE MATHEWS 10 YOA WERE PRESENT IN THE ROOM AT THE TIME. THE VICTIM SUFFERED A CUT TO HIS HEAD AND CONTUSIONS ON HIS SHOULDERS AS A RESULT OF THE BEATING. WHILE THE SUBJECTS WERE BEATING THE VICTIM, THEY WERE TELLING HIM THAT THEY WERE GOING TO SHOOT HIM AND KILL HIM. THE SUBJECT DURHAM PLED GUILTY TO CARRYING A CONCEALED DEADLY WEAPON IN THE KENT COUNTY DELAWARE SUPERIOR COURT ON 12/28/1999, AND THE SUBJECT HENRY PLED GUILTY TO FORGERY SECOND DEGREE IN THE KENT COUNTY DELAWARE SUPERIOR COURT ON 04/10/2000.

Affiant: DET HUMPHREY (3864) of DOVER PD

Victims:

MICHAEL TAYLOR 2

AJMERE MATHEWS

SOCIETY/PUBLIC

Date of Birth

05/21/1998

02/28/1992

Relationship Victim to Defendant

Acquaintance

Relationship Undetermined

Relationship Undetermined

who had
the gun?
A denies
any involvement
CO-D Quenton
Harris

Apprehended
next day
See other
file



Sworn and subscribed before me this 25th day of August A.D. 2002

Judge/Magistrate/Commissioner/Court Official

A-18#

NO-CONTACT PROVISIONS/CONDITIONS OF RELEASE/ORDER DURING COMMITMENT
IN LIEU OF BAIL

Case Number: 0208019537

You are ordered to have no contact, direct or indirect with ASHLEY GREEN FELICIA BATSON (hereinafter the "Alleged Victim"), or with the alleged victim's property, residence, place of employment, school, church, or at any other place.

No direct or indirect contact means that you are not to be in the physical presence of the alleged victim. Also, you cannot send letters, messages or notes to the alleged victim by mail, other person or otherwise. You cannot send messages to, or communicate with, the alleged victim by fax, telephone, or other electronic medium. You cannot send presents, gifts, or any other object to the alleged victim. You are not to contact the alleged victim in ANY way. It is a violation of this order if you have anyone, except your attorney, contact the alleged victim for you.

You will at all times stay 100 or more yards away from the alleged victim, the alleged victim's residence, and workplace.

Other: DEF IS NOT TO HAVE CONTACT WITH ANYONE WHO LIVES AT 34 HERITAGE DRIVE OR ANYONE WHO LIVES AT 1289 WALKER RD.

You understand that, because this is an order of the Court, you cannot violate this order even if the alleged victim requests, agrees, or contacts you in violation of this order.

You also understand that if you accidentally come in contact with the alleged victim in a public place or other setting, it is your duty not to have any contact and to leave that place immediately.

You also understand that this order must be followed whether you post bail or are in jail.

This order must be followed until it is changed or withdrawn by this Court or another Court having jurisdiction, or until the case is ended. If this order causes you undue hardship, or you wish to modify this order, you may file a request with the appropriate Court to change or withdraw this order.

It is so ORDERED.

Agnes E Pennella
Justice of the Peace AGNES E PENNELLA

August 28, 2002
Date

I CERTIFY THAT I HAVE READ AND UNDERSTAND THE ABOVE ORDER.

Unable to sign
Defendant MICHAEL DURHAM



082802
Date

cc-D

NO-CONTACT PROVISIONS/CONDITIONS OF RELEASE/ORDER DURING COMMITMENT
IN LIEU OF BAIL

Case Number: 0208019524

You are ordered to have no contact, direct or indirect with MICHAEL TAYLOR 2 FELICIA BATSON (hereinafter the "Alleged Victim"), or with the alleged victim's property, residence, place of employment, school, church, or at any other place.

No direct or indirect contact means that you are not to be in the physical presence of the alleged victim. Also, you cannot send letters, messages or notes to the alleged victim by mail, other person or otherwise. You cannot send messages to, or communicate with, the alleged victim by fax, telephone, or other electronic medium. You cannot send presents, gifts, or any other object to the alleged victim. You are not to contact the alleged victim in ANY way. It is a violation of this order if you have anyone, except your attorney, contact the alleged victim for you.

You will at all times stay 100 or more yards away from the alleged victim, the alleged victim's residence ., and workplace.

Other: NO CONTACT WITH ANYONE WHO LIVES AT 34 HERITAGE DRIVE OR 1289 WALKER RD.

You understand that, because this is an order of the Court, you cannot violate this order even if the alleged victim requests, agrees, or contacts you in violation of this order.

You also understand that if you accidentally come in contact with the alleged victim in a public place or other setting, it is your duty not to have any contact and to leave that place immediately.

You also understand that this order must be followed whether you post bail or are in jail.

This order must be followed until it is changed or withdrawn by this Court or another Court having jurisdiction, or until the case is ended. If this order causes you undue hardship, or you wish to modify this order, you may file a request with the appropriate Court to change or withdraw this order.

It is so ORDERED.


Justice of the Peace AGNES E PENNELL

August 28, 2002
Date

I CERTIFY THAT I HAVE READ, UNDERSTOOD, AND THE ABOVE ORDER.

unable to sign
Defendant MICHAEL DURHAM


Date

CC D

A-20.#

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,

Plaintiff,

V.

MICHAEL DURHAM,

Defendant.

*
*
* IK 02-09-0234 R1, IK 02-11-0100 R1,
* IK 02-09-0235 R1, IK 02-09-0233 R1,
* IK 02-11-0101R1, IK 02-11-0106 R1,
* IK 02-11-0102R1, IK 02-09-0238R1,
* IK 02-11-0103R1, IK 02-09-0243R1,
* IK 02-09-0245R1, IK 02-11-0118R1
*
*

AFFIDAVIT OF SANDRA W. DEAN, ESQUIRE, IN ANSWER TO:

MOTION FOR POSTCONVICTION RELIEF

1. I am a member of the Delaware Bar, having been admitted on December 13, 1990.
2. This affidavit is being filed pursuant to an Order of Commissioner Andrea Maybee Freud dated May 16, 2005 that I respond to the Defendant's allegations on or before June 22, 2005.
3. The Defendant alleges the following grounds for his assertion of ineffective assistance of Counsel. (It is noted that the Defendant alleges that I was ineffective due to failure to raise objections to "Ground One - Vindictive Prosecution and/or Misconduct" and "Ground Two - Judicial Misconduct and/or Abuse of discretion." Therefore I will answer regarding Grounds One and Two in this Affidavit).

Ground One:

In summary, the Defendant asserts that the prosecutor

- (a) improperly argued accomplice liability;
- (b) "allowed the Defendant and a defense witness to be put in the same cell"; and
- (c) permitted "perjured testimony".

A-21 #

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FILED

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DENIED.

(a) The case was largely, based on the allegation that Mr. Durham acted as an accomplice to Quentin Henry and another uncharged person ("Peebo") in committing the crimes charged. An accomplice theory was factually a part of the state's case; the facts were properly presented by the state and disputed by the defense.

(b) Quentin Henry was acquitted in an earlier trial. In this trial, he testified for the defense, admitting his own actions in committing the crimes and testifying that Mr. Durham was not present nor a participant in any way. Unfortunately for Mr. Durham, the jury did not find Mr. Henry credible. (In the trial where Henry was acquitted, one of the police officers was confused in his testimony between Henry and Henry's brother.

Correctional staff in the Courthouse cellblock placed Durham and Henry in the same cell for a brief time. There was no evidence that the prosecutor knew of this before it happened or "allowed it". The correctional officer testified that he did not hear any threats, promises or discussion about testimony between Durham and Henry.

(c) The State presented evidence and testimony which supported their prosecution, and the defense vigorously contested it. The jury made their decision on the truthfulness of the witnesses after hearing both sides and arguments.

Ground Two:

In summary, the Defendant asserts that the Court erred in:

- (a) failing to give an unanimity instruction on accomplice liability;
- (b) allowing Detective Humphrey to improperly bolster the victim's testimony; and
- (c) denying a mistrial due to an inattentive juror.

A-22 #

DENIED.

(a) The Jury was correctly instructed on accomplice liability (jury instructions, pp. 10-11). A specific unanimity instruction is required if one count encompasses two separate incidents, either of which could support a Defendant's conviction for a particular charge. Liu v. State, 628 A.2d 1376 (1993). In the seminal case on this issue, Probst v. State, 547 A.2d 114 (1988), there was an issue as to whether the Defendant's shots or her brother's shots supported the verdict. In Mr. Durham's case, there were no facts which required a unanimity instruction. The Delaware Supreme Court has held that a unanimity instruction is not required in every accomplice case. Probst at 122, and Liu at 1386.

(b) Improper bolstering generally refers to a case where an arresting officer testifies as both a fact and expert witness, potentially increasing the risk that the jury will overestimate the probative value of his own factual testimony. [See: Hardin v. State, 844 A.2d 982 (2004)]. In this case, Detective Humphrey testified regarding his contacts with the victim, Michael Taylor. (Transcript, Vol. B pp 30-43). Humphrey could not remember exactly when he told Taylor that Durham had been arrested. This did not bolster Taylor's testimony. In fact, in closing argument (Vol. C, pp. 73-74) I pointed out to the jury that it was possible that Taylor had learned about Durham's arrest from police and therefore decided to falsely implicate Durham.

(c) The issue of the inattentive juror was the subject of a Defense Motion for a New Trial and it was an issue on appeal to the Delaware Supreme Court.

Ground Three:

In summary, the Defendant asserts that I was ineffective due to:

(a) Failure to investigate, take fingerprints, blood samples, or have a police line-up.

A-23 #

(b) Failure to "find other possible witnesses".

(c) Failure to object to admission of the gun into evidence.

DENIED.

(a) The burden is on the State, not the defense, to prove the charges. In closing argument I pointed out to the jury (C-175) that there had been no photo identification whatsoever of Mr. Durham. I also noted (C-175) that the State did not explain or identify blood found on a curtain, nor did the State (C-76) take any fingerprints.

If the defense had attempted to obtain fingerprints or blood testing, there is a likelihood that they would have incriminated Mr. Durham, or that they would have been irrelevant if they belonged to an accomplice. Throughout two trials, the victim positively and steadfastly identified Mr. Durham, whom he knew previously, as one of the perpetrators.

(b) In regard to possible witnesses, attached are:

(1) 09.26.02 interview with Jacqueline Henry, mother of Warner, Bruchette and Quentin. Also interview with Warner Henry.

(2) 04.03.03, State's interview with Warner Henry, related to Warner's plea in an unrelated case.

(3) 06.04.03 interview with Quinton Henry, who later changed his story.

(4) 09.02.03 investigation regarding employment of victim Michael Taylor.

(c) Mr. Durham was arrested in the bedroom of a house where the robbery weapon was found (in the kitchen) otherwise, there were no fingerprints or other evidence linking the gun to Mr. Durham, as I pointed out to the jury. There was no basis to object to the introduction of the gun or bullet fragments or casings found at the scene. Officer Littlefield did not tamper with evidence. He found a bullet fragment or casing on the floor and placed it on a table for Detective Humphrey to

A-24 #

ACCOMPLICE LIABILITY

A person indicted for committing an offense may be convicted either as a principal for acts which he committed himself or as an accomplice to another person guilty of committing the offense. With respect to the charges of Possession of a Firearm During the Commission of a Felony, four counts, Burglary First Degree, Attempted Robbery First Degree, Reckless Endangering in the First Degree, Terroristic Threatening, Assault Second Degree, Endangering the Welfare of a Child, Criminal Mischief and Aggravated Menacing, the State contends that the defendant may be found guilty either as a principal for acts he committed or as an accomplice if he intended to aid another person in committing some or all of the acts necessary for the commission of the offense. The pertinent section of our Criminal Code is as follows:

A person is guilty of an offense committed by another person when, intending to promote or facilitate the commission of the offense, the person aids, counsels, or agrees, or attempts to aid the other person in planning or committing it.

So, in order to find the defendant guilty of an offense committed by another person, you must find that all three of the following elements have been proved to your satisfaction beyond a reasonable doubt:

1. Another person committed the offenses charged; namely, Possession of a Firearm During the Commission of a Felony, Burglary First Degree, Attempted Robbery First Degree, Reckless Endangering in the First Degree, Terroristic Threatening, Assault Second Degree, Endangering the Welfare of a Child, Criminal Mischief and Aggravated Menacing as I will explain these offenses to you.

2. The defendant intended to promote or facilitate the commission of the offense. In other words, it was his conscious object or purpose to further or assist the commission of the offense.

3. The defendant aided, counseled, or agreed or attempted to aid the other person in planning or committing the offense.

It is the law that all persons who join together with a common intent and purpose to commit an unlawful act which, in itself, makes it foreseeable that a crime not specifically agreed upon in advance might be committed, are responsible equally as principals for the commission of such an incidental or consequential crime, whenever the second crime is one in furtherance of or in aid to the originally contemplated unlawful act.

Mere presence at the scene of the crime, without proof beyond a reasonable doubt of these three elements that I have outlined for you, does not support a finding of guilt under this section. You may find the defendant guilty of offenses committed by another person only if you are satisfied beyond a reasonable doubt that the offenses were within the scope of the agreed activity or were reasonably to be expected as incidental to that activity. If you find the defendant was merely present at the scene of the crime and nothing more, you must find that defendant not guilty.

Your verdict must be unanimous. However, should you return a verdict of "guilty" on a charge or a lesser included offense under that charge, your verdict need not be unanimous as to a specific theory of liability as a principal or as an accomplice so long as you unanimously agree as to the defendant's guilt.

1 they see him. It's not something, even in a moment
2 of stress, that a person would not normally notice.

3 Also, in the investigation of the case, we
4 never heard any evidence whatsoever about any photo
5 identification or any photo line-up that was done
6 showing Mr. Taylor photographs with Mr. Durham in
7 there or anything like that. There was no procedure
8 like that followed at all.

9 Mr. Taylor testified that he knocked on a
10 neighbor's door. One neighbor testified. She said
11 he didn't knock on her door.

12 How did blood get on the curtain at the back
13 door? Mr. Taylor's testimony did not include any
14 reference at all to going out the back door. He said
15 he ran out the front door, called for help. He
16 didn't say anything about going near the back door,
17 but yet there was blood on the inside of the curtain
18 at the back sliding door, and it would be reasonable
19 for you to infer, therefore, that Mr. Taylor has not
20 told us the complete story about what happened there
21 that night.

22 For some reason, there is a maroon car. He
23 never went to the back door. Michael Durham is

file

Memorandum

To: Sandra W. Dean, Esquire
CC: file
From: Robert B. Truitt, Sr., Investigator *rlt*
Date: September 30, 2002
Subject: State v. Michael Durham

ON THURSDAY, 09/26/02, AT 1455 HRS, WRITER CONTACTED JACQUELINE A. HENRY, DOB 09/09/62, 235 S. GOVERNORS BLVD. DOVER, DEL. 19901, 302-734-9905. CONTACT MADE BY PHONE.

JACQUELINE STATES HER SON, BRUCHETTE HENRY, WAS NOT PRESENT WHEN THE POLICE ARRESTED CLIENT. IT WAS HER OTHER SON, WARNER HENRY, DOB 06/03/86. STATES WARNER WAS AWARE THERE WAS WARRANTS FOR HIS ARREST AND HE USED HIS BROTHER'S NAME WHEN THE CLIENT WAS ARRESTED. WARNER WAS ALSO TAKEN INTO CUSTODY AND ARRESTED ON OTHER CHARGES. STATES WARNER IS CURRENTLY IN STEVENSON HOME.

ON MONDAY, 09/30/02, AT 1412 HRS, WRITER INTERVIEWED, WARNER HENRY, DOB 06/03/86. INTERVIEWED BY VIDEO AT STEVENSON HOME.

WARNER STATES HE WAS AT LIBERTY COURT WHEN THE CLIENT WAS ARRESTED. STATES HE WAS OUTSIDE WALKING AROUND WHEN HE OBSERVED CLIENT RUN INTO THE RESIDENCE OF ASHLEY GREEN. STATES HE OBSERVED THE POLICE AND KNEW HE WAS ALSO WANTED AND HE FOLLOWED CLIENT INTO ASHLEY'S RESIDENCE.

STATES THE CLIENT WAS ACTING VERY NERVOUS AND MADE THE STATEMENT THE POLICE ARE COMING TO THE DOOR. THE POLICE CAME AND IDENTIFIED THE CLIENT. STATES HE GAVE THE POLICE THE NAME OF HIS BROTHER, BRUCHETTE, BECAUSE HE KNEW HE WOULD GET ARRESTED.

STATES HE DID NOT SEE THE ROBBERY TAKE PLACE AND HAS NO IDEA WHO WAS PRESENT WHEN THE ROBBERY WAS COMMITTED. STATES CLIENT AND HIS OTHER BROTHER, QUINTON HENRY WERE ARRESTED FOR THE ROBBERY. STATES HE HAS NO KNOWLEDGE IF THEY DID IN FACT COMMIT THE ROBBERY.

A-29.#



M. JANE BRADY
ATTORNEY GENERAL

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

NEW CASTLE COUNTY
Carvel State Building
820 N. French Street
Wilmington, DE 19801
Criminal Division (302) 577-8500
Fax: (302) 577-2496
Civil Division (302) 577-8400
Fax: (302) 577-6630
TTY: (302) 577-5783

KENT COUNTY
102 West Water Street
Dover, DE 19901
Criminal Division (302) 739-4211
Fax: (302) 739-6727
Civil Division (302) 739-7641
Fax: (302) 739-7652
TTY: (302) 739-1545

SUSSEX COUNTY
114 E. Market Street
Georgetown, DE 19947
(302) 856-5352
Fax: (302) 856-5369
TTY: (302) 856-2500

PLEASE REPLY TO : KENT COUNTY

April 3, 2003

Sandra Dean, Esq.
Assistant Public Defender's Office
45 The Green
Dover, DE 19904

Thomas Donovan, Esq.
313 S. State Street
Dover, DE 19904

RE: State v. Michael Durham I.D. No. 0208019524
State v. Quinton Henry I.D. No. 0208019532

Warner

Dear Sandy and Tom:

On Friday, April 4, 2003, Detective Glenn Virdin and I interviewed the above captioned witness. In summary, the witness advised us that he was present in the Liberty Court in front of "E" building. He observed Michael Durham in the parking lot with a gun. He observed Durham point the gun at the person and then strike that person in the head. When the police arrived he told Durham to follow him into an apartment. The witness also advised that he spoke to his brother and corresponded with his brother during the pendency of the charges.

I am attaching hereto a copy of the plea agreement between the witness and the State.

Sincerely,

James Kriner
JAMES KRINER
Deputy Attorney General

JK/sb

c: file

A-30.#

Superior Court of the State of Delaware, Cent County

PLEA AGREEMENT

State of Delaware v. Warner A. Henry
0208021182
 Case No(s): 0207014503 Cr.A.#s: IK02-09-0727 + 0727
IK02-09-0727 461 0731

☐ Title 11 HAB. OFFENDER ☐ BOOT CAMP ELIGIBLE ☒ INELIGIBLE
☐ RULE 11(e)(1)(C) — If out of guideline, reason is as follows: _____
☐ Title 11, § 4336, sex offender notification required ☐ Title 11, § 9019(e), forensic fine ☐ \$100(F), ☐ \$50(M)

Defendant will plead guilty to:

Count	Cr.A.#	Charge [LIO if applicable]
1	IK02-09-0728	Trafficking (caine) (5-50 grams)
2	IK02-09-0730	Conspiracy 2°
3	IK02-09-0724	Conspiracy 1° (LIO)

12/17/02 Upon the sentencing of the defendant, a nolle prosequi is entered on ☐ the following charges ☒ all remaining charges on this indictment:

Count	Cr.A.#	Charge

Sentence Recommendation/Agreement: ☐ PSI ☒ Immediate Sentencing

1. L-V, 10 yrs., susp. after 5 yrs. for 2 yrs. L-III, 1 yr. L-II - 0728
 2. L-V, 2 yrs., susp. for 1 yr. L-I consecutive to above - 0730
 3. L-V, 1 yr., susp. for 1 yr. L-I consecutive to above - 0724

Re. parties stipulate that Discretionable to prosecution in Family Court, it will be prosecuted as an adult in Superior Court.
 State and Defendant agree to the following:

☒ Restitution: To victims of all charged offenses; amount to be submitted by AG w/in 60 days.
☐ No _____ contact w/ _____

☒ Other Conditions:

- The State will NP pending charges in Family Court (Case no. 0110004641). The State will make pro-rata restitution (if any) to the owner of the car in this case.
 - The State will give a brief statement concerning the circumstances of their discovery and will testify truthfully at the trial(s) of Henry-A's. If A provides substantial assistance in the conviction of Co-A's, the State will file a motion seeking to have A's prison sentence reduced to 2 years. The decision will be to file this motion.

DAG: Steve Welch
PRINT NAMEDEF. COUNSEL: BEN SCHWARTZ
PRINT NAME

SIGNATURE

SIGNATURE

Date: 12/17/02DEFENDANT: WARNER HENRY

A-31#

to file this motion is solely with the State.

To: Sandra W. Dean@Kent@Pub_Defender
From: Robert B. Truitt@Kent@Pub_Defender
Certify: Y
Priority: Normal
Subject: Client Michael Durham
Date: Wednesday, June 4, 2003 at 11:53:00 am EDT
Attached: None

Sandy,

On Wednesday, 06/04/03, at 0915 hrs, I interviewed Quinton Henry, via videophone at DCC. Quinton stated he would talk to me without Tom Donovan being present. Quinton states he was not at Michael's residence on August 27th, 2002, and he does not know if Michael was there.

Bob

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Robert B. Truitt
via HappyMail!

A-32.#

To: Sandra W. Dean@Kent@Pub_Defender
 From: Robert B. Truitt@Kent@Pub_Defender
 Certify: Y
 Priority: Normal
 Subject: re: Michael Durham
 Date: Wednesday, September 3, 2003 at 3:36:00 pm EDT
 Attached: None

Sandy,

On Tuesday, 09/02/03, at 1315 hrs, writer called Tanya, 302-736-0727. A message was left in the voice mail for Tanya to call writer.

On Tuesday, 09/02/03, at 1345 hrs, writer called Dover PD to obtain the address of Reflections located on Lockerman St. Writer was advised the business name Reflections did not appear in their data base.

On Tuesday, 09/02/03, at 1435 hrs, writer responded to Jarid's Barber Shop located at the intersection of Lockerman and Queen Sts. Writer requested to speak with the owner and was directed to go to the second floor shop and ask for Jimmy. Writer responded to the second floor and asked for Jimmy. Jimmy was not know in that shop. Writer did speak with one of the barbers and learned that Mark Williams owned the barber shop. Writer was given cell# 302-339-7011 for Mark Williams. On Tuesday, 09/02/03, at 1445 hrs, writer visited a clothing store next to Jarid's Barber Shop. Writer was advised this shop used to be Reflections and was owned by Mark Williams at that time. Writer was advised Reflections had been out of business for several months. On Tuesday, 09/02/03, at 1510 hrs, writer spoke with Mark Williams. Mark advised he used to own Reflections and sold the business to his cousin a few months ago. Mark advised his brother, Mike Taylor, used to work for him at Reflections, six days a week, from 1700 to 2200 hrs. Mark advised when Mike was working at Reflections during the evenings, Mike was also doing construction work in the daytime. Mark does not know the name of the construction company and was not familiar with the name Ron and Maags. Mark states Reflections was closed for approximately one month in the fall of 2002. States he thinks it was in November because it was cold outside. Mark states that Abdul Karim (Jarid) owns Jarid's Barber Shop, ph#302-736-0508. On Tuesday, 09/02/03, at 1600 hrs, writer phoned Jarid's Shop and spoke with Jarid. Jarid was reluctant to talk with writer and stated he did not know very much about Mike Taylor and knew very little about the business Reflections and does not remember when it was closed. Jarid is not familiar with the construction company Ron and Maags. On Wednesday, 09/03/03, at 1420 hrs, writer checked Deljis nickname file for the nickname Peebo. No match found for this name.

Bob

- - - - - Original Message - - - - -

At the first trial, victim Michael Taylor testified that in August 2002 he was working for his brother at brother's store, "Reflections" on Lockerman Street, and that in April 2003 he was working for "Ron and Maags Incorporated" renovating houses. Taylor's credibility is the issue in a retrial scheduled for September 15. Please contact Reflections and ask them for the dates in summer of 2002 when they were closed - we know it was for a month or more. Also ask if Taylor was employed there. Also, please visit the barber shop next door (owned by Durham's cousin) and ask them the same questions about Reflections. Finally, call Durham's niece, Tanya, 736-0727 she has been "investigating" the Reflections question. Can we locate Ron and Maags, and verify Taylor's employment? Finally, a participant in the robbery was an unknown black male, nickname "Peebo". Please check the list of street names for this individual? Thanks !

Sandra W. Dean

via HappyMail!CONFIDENTIALITY NOTICE

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- - - - - End of Original Message - - - - -

A-33[#]

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,

Plaintiff,

V.

MICHAEL DURHAM,

Defendant.

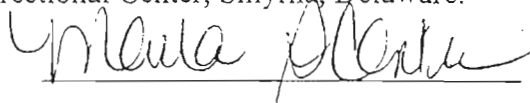
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IK 02-09-0234 R1, IK 02-11-0100 R1,
IK 02-09-0235 R1, IK 02-09-0233 R1,
IK 02-11-0101R1, IK 02-11-0106 R1,
IK 02-11-0102R1, IK 02-09-0238R1,
IK 02-11-0103R1, IK 02-09-0243R1,
IK 02-09-0245R1, IK 02-11-0118R1

CERTIFICATE OF SERVICE

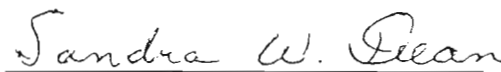
BE IT REMEMBERED that on this 9 day of June, 2005, personally appeared before me, a Notary Public for the State of Delaware, County of Kent, Marla S. Carter, a Paralegal, employed in the Office of the Public Defender, The Sykes Building, 45 The Green, Dover, Delaware 19901, who being by me duly sworn did depose and state as follows:

1. That she caused to be placed in the United States Mail, two (2) copies of the Affidavit of Sandra W. Dean, Esquire in Answer to: Motion For Postconviction Relief, in the above-captioned matter to Michael Durham, Delaware Correctional Center, Smyrna, Delaware.



Marla S. Carter

SWORN TO AND SUBSCRIBED by me the date and year aforesaid.



Notary Public/ Attorney At Law

ATTORNEY AT LAW
WITH POWER TO ACT
AS NOTARY PUBLIC
PER 23 DEL C 4012-4013

A-34. #

M. JANE BRADY
ATTORNEY GENERAL



STATE OF DELAWARE
DEPARTMENT OF JUSTICE

NEW CASTLE COUNTY
Carvel State Building
820 N. French Street
Wilmington, DE 19801
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Civil Division (302) 577-8400
Fax: (302) 577-6630
TTY: (302) 577-5783

KENT COUNTY
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Dover, DE 19901
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Fax: (302) 739-6727
Civil Division (302) 739-7641
Fax: (302) 739-7652
TTY: (302) 739-1545

SUSSEX COUNTY
114 E. Market Street
Georgetown, DE 19947
(302) 856-5352
Fax: (302) 856-5369
TTY: (302) 856-4698

PLEASE REPLY TO : New Castle County - Criminal Division

September 1, 2005

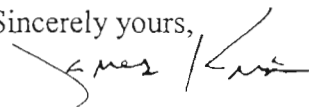
Commissioner Andrea Maybee Freud
Kent County Courthouse
Superior Court Judges Chambers
38 The Green
Dover DE 19901

RE: State of Delaware v. Michael Durham
Case #0208019524

Dear Commissioner Freud:

I am enclosing herewith a copy of the State's Memorandum of Law in Opposition to Motion for Post Conviction Relief Pursuant to Rule 61 in the above captioned case.

Sincerely yours,


James Kriner
Deputy Attorney General

:sas

cc: Michael Durham
Sandra Dean, Esquire

A-36. #

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)
)
 V.) ID # 0208019524
)
MICHAEL DURHAM)

*STATE'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR
POST CONVICTION RELIEF PURSUANT TO RULE 61*

STATEMENT OF FACTS

On August 27, 2002, Michael Taylor was at home with three young children when three men forced their way into his home. The men chased and assaulted him. Taylor attempted to escape by running to the second floor. As Taylor ascended the steps, one of the men shot at him. The three men followed him to a second floor bedroom where they struck him in the head with a pistol and demanded money from him. Taylor managed to escape from the men by running out of his house. Police were summoned to the residence but the three men fled before the police arrived.

Taylor suffered multiple abrasions and contusions. However, he was able to identify his attackers as Michael Durham, Quentin Henry and a man he knew only as "Peebo." Police noticed that Taylor's front door had been forced open and the frame was damaged. The police recovered a bullet lodged in the wall of Taylor's residence and a shell casing on the floor.

A-37.[#]

Michael Durham (the "Movant") was arrested less than an hour after the incident less than a half mile away. Police located a semi-automatic handgun in close proximity to the Movant. A ballistics expert examined the handgun and matched it to the ballistics evidence recovered from Taylor's residence.

STANDARD OF REVIEW

In reviewing a Motion for Post Conviction Relief pursuant to Superior Court Criminal Rule 61, the Court must first determine whether the claim is procedurally barred under Rule 61(i). Under certain circumstances, however, claims that may otherwise be procedurally barred may be still considered by the Court. See Superior Court Criminal Rule 61. An allegation of ineffective assistance of counsel is generally not subject to procedural default rule. See State v. Denston, No. IN99-05-1368, 2003 W.L. 22293651 at *3 (Del. Super. Oct. 2, 2003.). In cases alleging ineffective assistance of counsel, a Movant must show that counsel's conduct fell below an objective standard of reasonableness and that, but for counsel's unprofessional conduct, the result at trial would have been different. See Strickland v. Washington, 466 U.S. 668, 687 (1984). Conclusory allegations of unprofessional conduct are insufficient to support a motion for post conviction relief. Younger v. State, 580 A.2d 552, 555 (Del. 1990). A defendant must support his claim of ineffective assistance with concrete allegations of prejudice. Id. at 556. "[I]t is the defendant's burden to show, under the totality of the circumstances, that counsel was so incompetent that the accused was not afforded genuine and effective legal representation." Denston, 2003 W.L. 22293651, at *4. This burden is not easily met since there is a strong presumption that an attorney's conduct was professionally reasonable. Strickland, 466 U.S. at

A-38. #

689. It is under this framework that a court must evaluate the Movant's motion for post conviction relief in this case.

ANALYSIS

I. VINDICTIVE PROSECUTION OR PROSECUTORIAL MISCONDUCT

The Movant urges the Court to grant post-conviction relief because he claims the prosecutor engaged in vindictive prosecution or prosecutorial misconduct. He alleges that the prosecutor violated his right to a fair trial by advancing a theory of accomplice liability; allowing a defense witness to be placed in the same holding cell during the trial; and presenting perjured testimony. It is clear that there was no vindictive prosecution. Vindictive prosecution arises in situations where a defendant on retrial, following a successful appeal, was subjected to a harsher sentence by the court, or is charged with more serious charges. State v. Wharton, 1991 W.L. 138417, at *10 (Del. Super. June 3, 1991). The claim of prosecutorial misconduct is procedurally barred because Movant failed to raise the claim prior to conviction or on appeal. See Superior Court Criminal Rule 61(i)(2) and (3). The Movant requested a mistrial prior to the verdict, filed a motion for a new trial after the verdict, and appealed the verdict to the Delaware Supreme Court. Movant fails to demonstrate any cause for relief from the procedural default. Accordingly, the claims are procedurally barred and must be denied.

Even assuming the claims are not procedurally barred, the claims lack merit.

A. Accomplice Liability

Movant alleges that his rights were violated when the prosecutor advanced a theory of accomplice liability. A person may be held liable for the conduct of another when he [a]ids,

A-39.[#]

counsels or agrees or attempts to aid the other person in planning or committing it.” Del Code Ann. tit. 11 §271. The evidence supported a theory of accomplice liability. Trial counsel agrees. The trial judge agreed and instructed the jury on accomplice liability. The Movant’s assertion is simply without merit.

B. Defendant and Defense Witness Were Placed In Same Holding Cell

The Movant alleges that his rights were violated when the Department of Correction placed his co-defendant, Quentin Henry, in the same holding cell during trial. He implies that the prosecutor had something to do with the placement. The allegation is not supported by any evidence in the record. Moreover, there is no logical reason a prosecutor would knowingly allow a defense witness to share a cell with a defendant during a trial. The situation allows for collaboration and intimidation which does not benefit the State. Therefore, the Movant’s claim is without merit.

C. Perjured Testimony

Movant argues that the prosecutor violated his rights by permitting Detective Humphrey to give perjured testimony. It is not clear what testimony is allegedly perjured or how the prosecutor knowingly permitted perjured testimony. There is no evidence that the witness gave perjured testimony and there is not evidence the prosecutor permitted any witness to give perjured testimony. Therefore, this claim is without merit.

II. JUDICIAL MISCONDUCT

The Movant argues that he is entitled to post conviction relief because the trial judge engaged in misconduct and committed error. Specifically, he alleges the trial judge improperly instructed the jury on accomplice liability; he allowed improper bolstering of the State’s witness;

A-40.#

he committed error by not granting the Movant's motion for new trial due to ineffectiveness; and failed to give the jury specific unanimity instruction. The claims by Movant are procedurally barred because Movant failed to raise all but one of the claims prior to conviction or after conviction. See Superior Court Criminal Rule 61(i)(2) and (3). The claim that the trial judge erred in failing to grant a motion for new trial due to juror inattentiveness is also procedurally barred and will be addressed below.

Even if the claims were not procedurally barred, they are without merit for the reasons set forth below.

A. Accomplice Liability

The Movant claims that the trial judge violated his rights by instructing them on accomplice liability. As noted above, an accomplice liability instruction was justified based on the facts of the case. The record evidence supported the instruction. A trial court should instruct a jury on accomplice liability provided the instruction is supported by the evidence and correctly states the law. Zimmerman v. State, 565 A.2d 887, 890 (Del. 1989). The trial judge appropriately instructed the jury on accomplice liability. Therefore, the claim is without merit.

B. Improper Bolstering

The Movant argues that the trial judge "allowed improper bolstering of state's witnesses through testimony at trial." It is unclear what specific improper bolstering took place and how it violated his constitutional rights. The Movant has failed to set forth a cognizable legal claim.

C. Inattentive Juror

Movant argues that he is entitled to post conviction relief because the trial judge erroneously denied Movant a new trial due to juror inattentiveness. This claim is procedurally

A-41.#

barred because it was previously raised in Movant's motion for new trial and on appeal. Any ground for relief that was formerly adjudicated in an appeal or post conviction proceeding is thereafter barred. Superior Court Criminal Rule 61(i)(4). The trial judge reviewed this claim in a motion for new trial and denied it. See State v. Durham, 2004 W.L. 440219 (Del. Super. March 8, 2004). The Movant appealed the conviction to the Delaware Supreme Court. Durham v. State, 867 A.2d 176(Del. 2005). The Delaware Supreme Court affirmed the decision and commended the trial judge for his action. Id. at 181. The claim is also without merit for the reason set forth in the trial judge's opinion since there was no evidence of actual prejudice or circumstances so egregious and inherently prejudicial which raise a presumption of prejudice. State v. Durham, 2004 W.L. 440219, at *1. Therefore, the Movant's claim must be denied.

D. Unanimity Instruction

The Movant asserts that the trial judge erred in failing to give a specific unanimity instruction in this case. It is not entirely clear why the Movant believes he was entitled to a specific unanimity instruction. Neither the State, trial counsel nor the trial judge believed he was entitled to a specific unanimity instruction. A specific unanimity instruction is not required in every case where a defendant may be convicted as a principal or accomplice. Ayers v. State, 844 A.2d 304, 309 (Del. 2004); Lice v. State, 628 A.2d 1376, 1386 (Del. 1993); Probst v. State, 547 A.2d 114, 122 (Del. 1988). A specific unanimity instruction is only required if one count encompasses two separate incidents either of which could support a defendant's conviction for a particular charge. Ayers, 844 A.2d at 309. In the Movant's case, the evidence showed that there was a single incident that formed the basis of the charges. C.f. Probst v. State, 547 A.2d 114 (Del. 1988). Therefore, a specific unanimity instruction was not warranted.

A-42[#]

III. Ineffective Assistance of Counsel

The Movant argues that he is entitled to post conviction relief because trial counsel was ineffective. He alleges that trial counsel failed to adequately conduct a pretrial investigation and failed to object to the admission of the handgun into evidence. The Movant is unable to satisfy either prong of Strickland.

A. Pretrial Investigation

The Movant asserts that “counselor may have found other possible witnesses whom may perhaps give different accounts. ...” Movant does not state who the witnesses were or how they would have changed the outcome in the case. Conclusory allegations of unprofessional conduct are insufficient to support a motion for post conviction relief. Younger v. State, 580 A.2d 552, 555 (Del. 1990). Moreover, in her affidavit trial counsel provided a list of witnesses she spoke to and the results of the interviews.

Movant also asserts that trial counsel failed to conduct an investigation with respect to blood, fingerprints and a photographic line up. The Movant does not indicate how this was deficient, or how a proper investigation would have resulted in his acquittal. The Dover Police did not collect blood evidence from the victims’ house. The police did not recover any latent fingerprints. The police did not create a photo lineup with the Movant because the victim knew him and identified him by name. Trial counsel responds that if defense counsel attempted to obtain fingerprints “there is likelihood that they would have incriminated Mr. Durham or they would have been irrelevant if they belonged to an accomplice.” Fingerprint or blood evidence recovered from the crime scene wouldn’t have exculpated the Movant since he committed the crime with two other men, one of whom was unknown to the police.

A-43-#

B. Failure to Object to Evidence

Movant argues that trial counsel failed to object to the admission of a handgun and a shell casing. The handgun was recovered from the apartment where the Movant was arrested shortly after the home invasion. A ballistics expert matched the gun to evidence recovered from the scene of the home invasion. There was no legitimate basis to object to the admission of the gun. There was also no legitimate basis to object to the admission of the shell casing recovered from the crime scene. Sgt. Littlefield located the shell casing on the floor of the residence when he arrived. He testified he picked it up and placed it on a table so that it would not be lost. There was no evidence that the casing was tampered with or that its evidentiary value was compromised. The Movant does not advance a legal basis that trial counsel may have relied upon to object to these items. The State suggests that none exists.

The Movant fails to satisfy his burden under Strickland. His allegations of unprofessional conduct are not grounded in fact or law. It is evident that trial counsel conducted a thorough pretrial investigation. Even the Movant is unable to suggest what she could have done differently in her representation of him. It is also clear that there was no legal basis to object to the admission of the handgun or shell casing. The Movant fails to state what legal basis counsel should have used to object to the evidence; this is so because no basis existed. The gun and the casing were properly seized and highly probative of the Movant's guilt.

IV. DOUBLE JEOPARDY

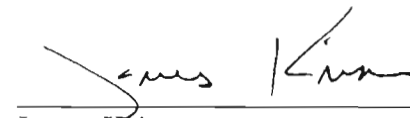
The Movant argues that he is entitled to post conviction relief because he was convicted in violation of the Double Jeopardy clause. This claim is procedurally barred because the Movant failed to raise the issue prior to his conviction or on appeal. See Superior Court Criminal Rule 61(i)(2) and (3).

A-44.[#]

Even assuming the claim was not procedurally barred, the claim is without merit. The Movant was indicted on four separate counts of Possession of a Firearm During the Commission of a Felony related to Robbery First, Burglary First, Reckless Endangering First and Kidnapping First. During the first trial, the defense successfully argued a motion for judgment of acquittal on Kidnapping First. Accordingly, the Court dismissed the related Possession of a Firearm During the Commission of a Felony charge. However, the Court did not disturb the three remaining Possession of a Firearm During the Commission of a Felony charges. These charges were separate and distinct from the charge that was dismissed. The Movant's claim that he was convicted of a crime for which he was previously acquitted is factually inaccurate.

CONCLUSION

The Movant is not entitled to post conviction relief. His claims that there was prosecutorial misconduct, judicial misconduct, and that he was convicted in violation of the Double Jeopardy Clause are procedurally barred. Even if the claims were not procedurally barred they lack merit. The Movant is also not entitled to relief based on ineffective assistance of counsel because he is unable to satisfy either prong of Strickland. Therefore, the State respectfully requests that the Motion be denied.



James Kriner
Deputy Attorney General
Carvel State Building, 7th Floor
820 N. French Street
Wilmington, De 19801

A-45. #

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)
)
 v.) ID # 0208019524
)
MICHAEL DURHAM)

NOTICE OF MAILING

BE IT REMEMBERED on this 1st day of September, 2005, I, Sandra Schock, Secretary for the Department of Justice, did cause to be delivered via United States mail two (2) true and correct copies of the State's Memorandum of Law in Opposition to Motion for Post Conviction Relief Pursuant to Rule 61 to:

MICHAEL DURHAM, SBI No: 00161286
DEPARTMENT OF CORRECTION
1181 PADDOCK ROAD
SMYRNA DE 19977

Sandra Schock
Department of Justice

DATED: September 1, 2005
:sas

A-46 #

Office of Disciplinary Counsel

SUPREME COURT OF THE STATE OF DELAWARE

200 West Ninth Street
Suite 300-A
Wilmington, Delaware 19801
(302) 577-7042
(302) 577-7048 (FAX)

MARY M. JOHNSTON
Chief Counsel

ANDREA L. ROCANELLI
MICHAEL S. MCGINNISS
MARY SUSAN MUCH
Disciplinary Counsel

October 14, 2003

CONFIDENTIAL

Mr. Mike D. Durham (#161286)
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Re: Disciplinary Complaint

Dear Mr. Durham:

We received your letter dated October 5, 2003, regarding Sandra W. Dean, Esquire, the public defender representing you in your criminal matter. If you wish to file a disciplinary complaint against Ms. Dean, please complete and return the enclosed complaint form, providing the specific details of your complaint.

For your general information, please be advised that this Office is not a court of law. Rather, this Office evaluates and investigates complaints that allege violations of the Delaware Lawyers' Rules of Professional Conduct. We have no authority to vacate a conviction, reduce a sentence, appoint counsel to represent a defendant or grant any other type of substantive relief. This Office cannot offer you legal advice, nor can we intervene in a criminal proceeding for any reason. We cannot take any action on your behalf in your criminal matter.

Please also be aware that this Office does not adjudicate a criminal defendant's claims of ineffective assistance of counsel or prosecutorial misconduct. Where a complaint filed with this Office relates to such allegations, it is usual for this Office to send the complaint to the criminal defense attorney or the prosecuting attorney, as well as that attorney's supervisor, for appropriate action. This Office does not conduct a disciplinary evaluation or investigation for such complaints because this Office has no jurisdiction to affect a criminal matter. Pretrial and postconviction remedies are available to the criminal defendant for that purpose.

Sincerely,



Margot R. Millar
Administration

/mrm

Enclosure

A-47. #

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

*pleading
1-9-04*

STATE OF DELAWARE

v.

MICHAEL DURHAM,

Defendant.

*
*
*
*
*
*
*
*

ID# 0208019524 A

MOTION FOR NEW TRIAL

COMES NOW, the defendant Michael Durham by and through his attorney, Sandra W. Dean, Esquire, who pursuant to Superior Court Rule 33, moves this Honorable Court to grant him a New Trial. In support of his Motion, he avers as follows:

1. During jury deliberations, the Defendant and others brought to the attention of Counsel that Juror Number Nine was inattentive, dozing or sleeping during the Trial.

2. This was observed by at least three observers present in the Courtroom.

a. An Affidavit is attached from William A. Mizell, a Courtroom observer.

b. Beth Savitz, Esquire was in the Courtroom and will submit an Affidavit when she returns from vacation.

c. Leroy Poore, a Correctional Officer in the Courtroom, told Defense Counsel that the Juror was "not attentive and was nodding in and out". The statement was immediately recorded verbatim in Counsel's notes. Mr. Poore now denies this in his attached Affidavit.

3. Every Defendant has the right to a fair Trial and due process of law. This includes the right to a jury whose members are all alert and attentive.

DKG *A-48.#*

WHEREFORE, in the interests of justice, the Defendant requests that the Court grant him
a new trial.

Sandra W. Dean

SANDRA W. DEAN, ESQUIRE
Assistant Public Defender
Office of the Public Defender
The Sykes Building
45 The Green
Dover, DE 19901

~~A-47~~

A-49.#

STATE OF DELAWARE *
 * SS:
COUNTY OF KENT *

BE IT REMEMBERED that on this 5th day of December, 2003, personally appeared before me, a Notary Public for the State and County aforesaid, WILLIAM A. MIZELL of 93 Orchard Avenue, Dover, Delaware, a credible person, known to me to be such, and who by me being duly sworn according to law did depose and say as follows:

1. I was present for most of the trial of Michael Durham this week in Kent County Superior Court.

2. I observed a juror, a black female in the front row in the jury box, dozing off on several occasions during the trial.

3. On Monday, December 1, I noticed that during the trial, the juror's eyes would close and then she would catch herself and open her eyes, and come back to attention.


4. I also observed her dozing on Wednesday, December 3.

5. During the reading of the jury instructions, it was obvious that she was struggling to stay awake. Her eyes would close, flutter open, then close again, then flutter open again. I could tell she was fighting sleep. I did not count the number of times this happened, but I can estimate that it was four times.

6. Also, during Mr. Kriner's closing statement she was dozing. It happened twice that I am sure of, possibly more.


WILLIAM A. MIZELL

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.


BENJAMIN A. SCHWARTZ
A Delaware Attorney
ATTORNEY AT LAW
WITH POWER TO ACT
AS NOTARY PUBLIC
PER 29 DEL C 4323 (a) (3)

~~178~~ A-50#

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE STATE OF DELAWARE

VS.

MICHAEL DURHAM,

Defendant.

*
*
*
*
*
*
*

ID# 0208019524 A and B

AFFIDAVIT

CORPORAL

I, Leroy Poore, am a Correctional ~~Officer~~ for the State of Delaware.

I was present in the Courtroom during the Trial of State v. Michael Durham.

I PUT LINES THRU THIS SENTENCE BECAUSE I NEITHER TYPED NOR SAID THIS STATEMENT / L. Poore
~~I observed that Juror #9 was not attentive and was "nodding in and out".~~

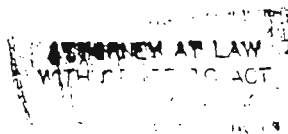
MY MAIN CONCERN, FOCUS AND ATTENTION WAS TOWARD THAT OF THE INMATE
AT THE DEFENSE TABLE ON TRIAL, FOREMOST FOR SECURITY REASONS.

L. Poore
DEC. 07, 2003.

Leroy Poore
Leroy Poore

Sworn to and Subscribed before me this 10th day of December 2003.

Sandra W. Dear
Notary / attorney



ATTORNEY AT LAW
WITH POWER TO ACT
AS NOTARY PUBLIC
PER 29 DEL C 4323 (a) (3)

A-51. # DA

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	:	Cr. A. Nos.	KC02-09-0233 thru 0245
	:		KC02-11-0100 thru 0107
v.	:		KC02-11-0118
	:		
	:	ID #	0208019524
MICHAEL DURHAM	:		

STATE'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT'S MOTION FOR NEW TRIAL

Between December 1, 2003 and December 3, 2003, the defendant was tried for a home invasion robbery in Dover, Delaware. The jury returned a verdict of guilty on the majority of the charges on December 4, 2003. The defendant made a motion for a new trial pursuant to Superior Court Rule 33 alleging that a juror slept through portions of the trial. An evidentiary hearing was held on January 9, 2004. At the conclusion of the hearing, the Court requested that the parties write memoranda in support of their respective positions. This is the State's Memorandum of Law in Opposition to the Defendant's Motion for New Trial.

RELEVANT FACTS

The trial of State v. Michael Durham commenced on December 1, 2003 and concluded with closing arguments on the morning of December 3, 2003. Prior to excusing the jury to deliberate, neither the defense counsel, the prosecutor or the Court observed any juror sleeping.

A-23 A-52[#]

The prosecutor specifically recalls that Juror #9 had her eyes open during his closing argument; although, he concedes he did not observe her during the entire closing argument. During the afternoon of December 3, 2003, the jury sent the Court several notes regarding questions they had on the law. The jury did not reach a verdict on the afternoon of December 3rd, so the Court excused them for the day and requested that they return on December 4th to continue their deliberations.

On the morning of December 4th, defense counsel requested a mistrial. She noted that her client noticed one of the jurors sleeping during the trial.

An evidentiary hearing was held on January 9, 2004. The trial judge, Honorable President Henry DuPont Ridgely, presided over the hearing. A total of five witnesses were called by the Court: Shirley Riley ("Juror #9"), Beth Savitz, Esquire ("Savitz"), Corporal Leroy Poore (Poore"), William Mizell ("Mizell") and Joseph Sanchez ("Sanchez").

Juror #9 testified that she is a 67 year old woman who is currently not employed. She denied having any physical or mental disabilities that interfered with her jury service. She was questioned extensively by the Court about her conduct during the trial and was confronted with allegations that she appeared to be sleeping or dozing. The juror adamantly denied sleeping during trial, but she admitted she may have nodded for 1-2 seconds on the first day of trial. She testified that she sometimes listened to testimony with her eyes closed and noted she did this when she listened to something particularly important. Finally, she indicated that she understood and comprehended the evidence and the Court's instructions in this case.

Savitz testified that she is a local criminal defense attorney and attended the trial to observe the prosecutor. She attended the first day of trial, but only observed the first two

~~A-24~~ A-53.#

witnesses.¹ In her affidavit, Savitz indicated she only observed the direct examination of the witnesses. She testified that while present in the courtroom, she observed a juror with her eyes closed; but admitted she did not watch the juror the entire time and could not estimate the total amount of time the juror had her eyes closed. Savitz also testified that she wrote several notes to defense counsel during the time she was present in the courtroom. She characterized these notes as strategy advice to defense counsel. Savitz did not mention her observations about the juror to defense counsel or the Court. Finally, Savitz denied that she observed the juror sleeping.

Poore testified that he is a corrections officer with the Department of Correction. He denied that he ever observed the juror sleeping. He admitted to making a statement that "the two people who should be aware of juror attentiveness are Ms. Dean and Mr. Kriner."

Mizell testified that he was present during the trial as an observer. He is a 62 year old retiree who observes trials to occupy himself. He testified that he observed a juror struggling to keep her eyes open during the first and second day of trial, and during the State's closing argument on the third day. He testified that he was asked to prepare an affidavit by his personal attorney, another local criminal defense attorney, Benjamin Schwartz, Esquire. In that affidavit, Mizell only mentioned incidents of alleged misconduct on the first and third day. Mizell testified that he did not observe the juror sleeping during any portion of the trial.

Sanchez testified that he was the bailiff assigned to the case for the entire trial. It was his job to monitor the jurors' conduct throughout the trial. He testified that he has special training to observe jurors when they close their eyes during courtroom proceedings. Sanchez said he

¹The first two witnesses were the physician that treated the victim and the victim.

A-25

A-54.#

noticed the juror occasionally closed her eyes, so he circled her name on the jury sheet and made a special effort to watch the juror throughout the trial. He testified that on the first day of trial he noticed the juror swivelling in her chair when she closed her eyes; on the second and third days he adjusted his chair so that he had a direct view of the juror. He testified that Juror #9 never slept during the trial.

ISSUES

- I. Whether the record supports the allegations of juror misconduct.
- II. Assuming the record supports the allegation of misconduct, whether misconduct resulted in prejudice sufficient to warrant a new trial.

ANALYSIS

I. The Defendant Failed to Support Allegation of Juror Misconduct

The defendant has failed to prove an allegation of juror misconduct that would support a new trial. In order to justify a new trial a movant must prove that there was juror misconduct and the misconduct resulted in actual prejudice or so infringed upon defendant's fundamental right as to raise a presumption of prejudice. See Massey v. State, 541 A.2d 1254, 1257(Del. 1988) (citing Hughes v. State, 490 A.2d 1034 (Del. 1985)); see also US v. Tierney, 947 F.2d 854, 868 (8th Cir.1991), reh'g and reh'g en banc denied (Dec. 23, 1991) (holding that party claiming

misconduct must demonstrate misconduct and prejudice). The defendant does not allege any actual prejudice, and none is suggested by the record. In order to prevail on his motion the defendant must "establish the existence of egregious circumstances, - - ie, circumstances that, if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice in favor of the defendant." Massey, 541 A.2d at 1257.

In his brief, the defendant asserts that the juror "was either sleeping, dozing or was so sleepy that she could not keep her eyes open" "(Defendant's brief at #1), and that the defendant's guilt or innocence should be decided by twelve alert and attentive jurors." (Id. at #2). Vague or conclusory allegations of prejudice are insufficient to support a motion for new trial based on juror misconduct. See Tanner v. U.S., 483 US 107, 125 (1987); Tierney, 947 F.2d at 868. In Massey v. State, the Delaware Supreme Court rejected defendant's contention that juror misconduct necessitated a new trial. 541 A.2d 1254 (Del. 1988). The defendant was convicted of Murder in the First Degree; however, after trial the defendant learned that one of the jurors had indulged in drugs and alcohol during the trial. Id. at 1255. The Superior Court held an evidentiary hearing at which a juror admitted that he engaged in drug and alcohol use during trial. Id. at 1255-56. However, the other jurors could not recall any incidents during the trial that would indicate the juror was under the influence. Id. at 1255. Based on this record, the Superior Court denied the defendant's motion for a new trial. Id. at 1256. The Supreme Court upheld the denial, reasoning:

[J]uror self-indulgence in drugs does not necessarily equal intoxication and intoxication does not necessarily equal bias against the accused. Therefore, the mere introduction of some evidence of juror ingestion of alcohol or drugs is insufficient

to warrant a presumption of prejudicial influence against the defendant.

Id. at 1258. (quoting Estes v. Texas, 381 US 532, 542 (1965)). In the instant case, the record does not support the assertion that Juror #9 slept during the trial which would support an inference of prejudice to the defendant. Both Mizell and Savitz candidly testified that they had not observed the juror sleeping. Moreover, neither Mizell nor Savitz were focused on the juror such as Sanchez.² Sanchez was present to observe and monitor the jurors. Sanchez testified that he noticed the Juror #9 close her eyes on the first day of trial; so he circled her name on the jury sheet and kept a close watch on her. He also testified he has special training to observe jurors during trials. He testified that he observed the juror on all three days of trial and is certain she did not sleep.³ Juror #9 testified that she did not sleep during trial, although she admitted nodding for 1-2 seconds during the first day of trial. She testified that she would occasionally close her eyes during testimony and the jury instructions; however, she advised that she listened to and understood all of the evidence and instructions throughout the trial. Where there is no evidence in the record that a juror slept, a conviction should not be set aside. See Bialach v. State, 773 A.2d 386 (Del. 2001)(denying motion for post conviction relief based on allegations of juror misconduct supported only by a brief reference by counsel that a juror slept through closings and instructions). Since there is insufficient evidence to support juror misconduct and

²Savitz told the Court she was present to observe the prosecutor. Mizell stated that he was watching the trial and was, therefore, presumably focusing his attention on the testimony.

³Sanchez testified that he would observe other parts of the juror's body when her eyes closed to ensure she was not sleeping. He indicated she would swivel in her chair or move other body parts during those periods when her eyes were closed.

concomitant inherent prejudice, the defendant's conviction should not be set aside.

II. Assuming the Juror Slept or Dozed During Portions of the Trial, There is an Insufficient Basis to Infer Prejudice.

Even assuming that Juror 49 slept during portions of trial, the instances were too insubstantial to prejudice the defendant's rights. "[C]ourts have been reluctant to reverse a conviction or grant a new trial when it has been alleged that jurors have slept during portions of the trial." U.S. v. Ortiz, No. CRIM. A. 92-0592, 1993 US Dist. WL 303286, at *2 (ED PA August 5, 1993) aff'd 27 F.3d 560 (3d Cir. 1994); see also U.S. v. Freitag, 230 F.3d 1019, 1023 (7th Cir. 2000) ("Court is not invariably required to remove sleeping jurors."); U.S. v. Springfield, 829 F.2d 860, 864 (9th Cir. 1987) ("Every incident of misconduct does not require a new trial"). In U.S. v. Freitag, the 7th Circuit reviewed the district court's refusal to remove a sleeping juror during a criminal trial. 230 F.3d at 1023. The parties agreed that at least one juror slept during trial, but they disputed the extent of the sleep. Id. The lower court indicated that it noticed the juror was inattentive on at least two occasions. Id. The 7th Circuit held defendant's constitutional rights were not violated by the misconduct, reasoning "there is no evidence that the sleeping juror missed large portions of the trial or portions missed were particularly critical." Freitag, 230 F.3d at 1023. In order to receive a new trial based on misconduct, it is not enough to show the juror slept; the defendant must also prove that the juror slept through essential or substantial portions of trial. See Id.; see also Tierney, 947 F.2d at 868-69. ("Defendant has not shown that the jury ignored any particularly important items."); Ortiz, No. CRIM. A. 92-0592, U.S. Dist. 1993 WL 303286, at *2 ("[D]efendant must show that (1) the jury ignored

essential portions of trial and (2) that the defendant was prejudiced by jury misconduct.").

Assuming arguendo Juror #9 slept through portions of the trial, there is no evidence that she missed essential or substantial portions of the trial. Savitz testified that she observed the juror close her eyes, but could not testify how long her eyes were closed ("not a split second") nor how many times the juror closed her eyes. Mizell stated in his affidavit that he observed the juror "dozing off and on several times during the [three day] trial;" however, at the hearing he characterized the juror's actions as "struggling" to stay awake as opposed to sleeping. It is also noteworthy that neither defense counsel, the prosecutor nor the Court observed the juror sleeping. See Shayne v. U.S., 255 F.2d 739, 745 (1958)(noting since the jury was under the direct observation by the Court, some action would have been taken by the judge if the juror had been asleep for a noticeable amount of time). At most the evidence suggests that Juror #9 was sleepy. The mere fact that a juror may be sleepy or struggling to stay awake during trial does not equate to juror misconduct necessitating a new trial. See Sallahdin v. Gibson, 275 F.3d 1211, 1226 (10th Cir. 2002)(holding that there was no basis to remove a juror who was on a lot of medication and had trouble staying alert during the defense's case since there was no evidence she actually was asleep). Therefore, even assuming there were momentary lapses in attention, brought about sleep or sleepiness, the record does not support an allegation of prejudice which would warrant a new trial.

CONCLUSION

The defendant's motion for new trial should be denied. The evidence does not support the allegation of juror misconduct. But, even assuming there was misconduct, there it was not substantial enough to infer prejudice. Therefore, the motion should be denied.

1/30/04
DATE

James I. Kriner
JAMES KRINER
Deputy Attorney General

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE STATE OF DELAWARE

VS.

: I.D. NO. 0208019524

MICHAEL DURHAM

CERTIFICATE OF MAILING

COUNTY OF KENT

)

) SS

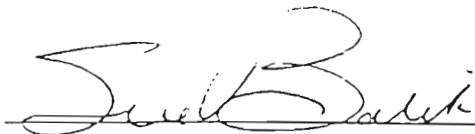
STATE OF DELAWARE

)

BE IT REMEMBERED that on this 30th day of January, 2004, personally appeared before me, a Notary Public in and for the County and State aforesaid, Sue Balik, known to me personally to be such, who after being duly sworn did depose and state:

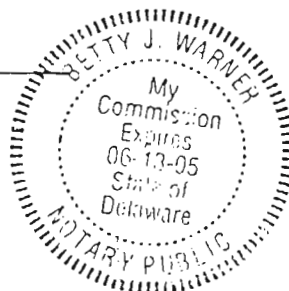
(1) That she is employed as a legal secretary in the Department of Justice, 102 W Water Street, Dover, Delaware.

(2) That on 30 day of January, 2004, she did deposit in the mail with sufficient postage attached, a copy of the attached STATE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL in the above-captioned matter properly addressed to Sandra Dean, Assistant Public Defender's Office, 45 The Green, Dover, Delaware, 19904.



SWORN TO and subscribed
before me the day aforesaid


Notary Public



~~A-38~~

A-61.#

Quentin Henry - Direct

1 something to my brother, something that happened to
2 my little brother. He was basically, Why did you do
3 this, why you do that. And then all during the same
→4 course we decided -- well, I decided like where the
5 money at, you got some money up here? Because I
6 know that -- well, I know he sell drugs so I just
7 decide that I be like, You got some money? You got
- 8 some money?

9 Well, things was happening kind of fast,
10 so then I guess Mike Taylor had jumped up and he had
11 just -- all I can remember, he just ran downstairs
12 and got out the house after that. And then we left
13 out the house. I went one way, and I don't know
14 where Peebo or Mike went.

15 Q. Okay. Now, why did you pick Mike Taylor's
16 house to go into that night?

17 A. Well, because something had happened to my
18 younger brother, some guys had home invaded my
19 younger brother, named Warner, and they had tied him
20 up inside of a bathroom, and they beat him up and
21 put him in the hospital really bad, put him in ICU,
22 and I heard rumors that the guy, Mike Taylor, had
23 did this to my little brother.

~~A-105~~

Quentin Henry - Direct

1 Q. So is that why you chose his house?

2 A. Yeah. That is why I chose his house, you
3 know what I mean, to pay him back or whatever. But
4 in like during the process I just happened to say,
5 You got the money? Because I knew he sell drugs. I
6 was like, You got the money, you got some money in
7 here? But the intention wasn't to rob him, it was
8 just like for what happened to my little brother.

9 Q. Okay. Now, you said when you left you ran
10 in one direction. Did Peebo and Michael Davis run
11 together, or do you know where they went?

12 A. Well, I actually don't know because I like
13 left out, like went out the front door, and like I
14 was doing like to -- because it is like you come out
15 the door, I had ran to the left. I ain't even -- I
16 wasn't even looking back. I don't know if they ran
17 together. They just went a whole different
18 direction than me.

19 Q. All right. Now, at the time this happened
20 had you ever heard of Michael Durham?

21 A. I heard of him.

22 Q. Okay. Was he a friend of yours?

23 A. No.

~~A-106~~
SHEILA A. DOUGHERTY
Official Court Reporter

A-63.#

Quentin Henry - Direct

1 Q. Okay. Did you hang out with him?

2 A. I ain't never hanged out with him before
-3 in my life.

4 Q. Okay. Now, up at the Delaware
5 Correctional Center are you in the same building or
6 in a different building from where he is?

7 A. No, we never been in contact the whole
8 time we been in there.

- 9 Q. Okay. Has he promised you anything to
10 testify here today?

11 A. No, ma'am.

12 Q. Has he threatened you in any way?

13 A. No, ma'am.

14 Q. Are you afraid of Michael Durham?

15 A. No.

16 MS. DEAN: No other questions, Your Honor.

17 THE COURT: You may cross-examine.

18 MR. KRINER: Your Honor, I believe there
19 are some matters we can address outside the presence
20 of the jury.

21 THE COURT: Show the jury out, please.

22 (The jury left the courtroom.)

23 THE COURT: Mr. Kriner.

~~A-107~~

SHEILA A. DOUGHERTY
Official Court Reporter

A-64. #

Quentin Henry - Cross

1 Q. Well, do you know that his nickname is Jim
2 or his real name is Jim?

3 A. No.

4 Q. You don't know that?

5 A. No, I don't know.

6 Q. So if you told Detective -- do you
7 remember being interviewed by Detective Virdin?

8 A. I remember getting locked up and I know --
9 I really can't remember too much that day because I
10 was like highly intoxicated and under the influence
11 of marijuana, and I had been drinking all night.

12 Q. Uh-huh. And you testified the other guy
13 is Mike Davis?

14 A. Yes, sir.

15 Q. Not Mike Durham?

16 A. Yes, sir.

17 Q. Right? Do you agree that Mr. Taylor's
18 children were there as this was happening?

19 A. Yes, sir.

20 Q. And his four-year-old son was sitting on
21 the bed as he was assaulted?

22 A. I have no idea which son or whatever. I
23 just know it was kids there.

A-H

SHEILA A. DOUGHERTY
Official Court Reporter

A-65.#

Quentin Henry - Cross

1 know because, like I said, when I got locked up I
2 was highly intoxicated and under the influence of
3 marijuana, so I don't remember any statements that I
4 gave the police that night and I never talking to no
5 police afterwards, so I don't know.

6 Q. Let me ask you this: Would it be accurate
7 or inaccurate, the truth or a lie, that you knew
8 Mike Taylor lived at that house?

9 A. I would say I knew that he lived there.

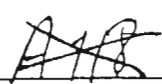
10 Q. And is it accurate or inaccurate, if you
11 said that you knew Peebo was -- his real name was
12 Jim?

13 A. I can't recall whether it was accurate or
14 inaccurate. I would say that it was probably
15 accurate that I said that.

16 Q. Is that accurate that Peebo's real name is
17 Jim?

18 A. I don't know what his real name is, so I
19 can't say if it is accurate or not from my
20 knowledge. I have no idea.

21 Q. So you would agree that if you told the
22 detective that you knew that Peebo's real name was
23 Jim, you would have not been telling the detective



SHEILA A. DOUGHERTY
Official Court Reporter

A-66.#

Quentin Henry - Cross

1 the truth?

2 A. Hum. Can you repeat that again, please?

3 Q. Sure. If you told the detective that
4 interviewed you that you knew that Peebo's real name
5 was Jim, that would not be accurate?

6 A. Right.

7 Q. Is your statement, is your testimony today
8 accurate or inaccurate?

9 A. I would say that it is accurate.

10 Q. Accurate. And you testified that you have
11 never been in contact with Mike Durham since you
12 have been in jail?

13 A. Never been in contact with him since I
14 been in jail.

15 Q. Never talked to him?

16 A. I had a couple words with him because down
17 in the holding cell down there they like side by
18 side, so I probably said a couple words to him, but
19 we don't talk like that because I hardly even know
20 him to even talk to him like that. But to like
21 during this case, like I just know that we was on
22 trial together for something he didn't do that I
23 did, and that is the only reason why I know him.

~~A-119~~

SHEILA A. DOUGHERTY
Official Court Reporter

A-67. #

Quentin Henry - Cross

1 Q. So the only -- you only said a couple of
2 words to him, and that was just while you are
3 downstairs?

4 A. Yeah. Like are they going to come get me,
5 are they like, when are they going to come get me,
6 like if he go upstairs I say something, are they
7 going to come get me yet, or something like that.

8 Q. Well, isn't it true that back in April you
9 and he sat in the same cell? Downstairs in lockup?

10 A. No. That is not true.

11 Q. Are you sure? When you were here last
12 time, in April, were you in the same cell before you
13 were brought up? Think about it.

14 A. No, we wasn't.

15 Q. Are you sure?

16 A. No. They side by side, but they separate.

17 Q. I am not talking yesterday.

18 A. Yeah. We talking all. They is separate.

19 Q. That is your answer, that you weren't in
20 the same cell?

21 A. We weren't in the same cell.

22 Q. Were not?

23 A. Were not.

~~A-120~~
SHEILA A. DOUGHERTY
Official Court Reporter

A-68 #

Quentin Henry - Cross

1 Q. Did you discuss the case at all?

2 A. No, we didn't.

3 Q. How about yesterday. Did you ever share a
4 cell with him yesterday?

5 A. Not that I can recall. We never shared a
6 cell, ever, because we can't be together for some
7 reason.

8 Q. I don't want an explanation for it, sir, I
9 just want you to answer yes or no.

10 Isn't it true that yesterday for a period
11 of time you were actually in the same cell with the
12 defendant?

13 MS. DEAN: Objection, Your Honor. It has
14 been asked and answered.

15 THE COURT: I will allow it.

16 BY MR. KRINER:

17 Q. Just yes or no, sir, yesterday.

18 A. No, sir.

19 Q. No. And you agree that you are in the
20 same institution with the defendant; correct?

21 A. We are in the same institution, but in
22 different parts.

23 Q. Okay. So your testimony today is that you

~~ATL~~
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Official Court Reporter

A-69. #

Quentin Henry - Cross

1 and the defendant have never discussed the case and
2 your testimony here today?

3 A. That's true.

4 Q. That's the same answer as you never shared
5 a cell yesterday?

6 A. That's true.

7 Q. And you weren't talking back and forth
8 when you weren't in the same cell yesterday?

9 A. No, we weren't.

10 Q. Now, it is true that you contacted
11 Ms. Dean to show up here and testify today?

12 A. Yes.

13 Q. And on behalf of the defendant?

14 A. Yes.

15 Q. And you never contacted Detective
16 Humphrey?

17 A. For what reason? What should I contact
18 him for?

19 Q. Well, to tell him your side of the story.

20 A. The reason why I contacted her, so I could
21 testify on his behalf, so I am here today.

22 Q. Exactly. You wanted to testify on the
23 defendant's behalf?

~~A-100~~
SHEILA A. DOUGHERTY
Official Court Reporter

A-70.#

Quentin Henry - Cross

1 A. Right.

2 Q. And have you previously been convicted of
3 crimes of dishonesty?

4 A. No.

5 Q. No? How about back in April of 2000?

6 A. Yes. I think I had a forgery second.

7 Q. So was that a yes now?

8 A. Oh, yes. I didn't know when you said
9 previous, was it like this year or -- I didn't know
10 exactly when.

11 Q. Are there any other questions that I have
12 asked you up until this point that you didn't
13 understand?

14 A. No, sir. Or I would have asked you.

15 Q. And criminal impersonation, you have also
16 been convicted of that; correct?

17 A. Yes, sir.

18 Q. And you agree that you have previously
19 made a statement to the police when you were
20 arrested for this incident; correct?

21 A. I can't recall what I said because I was
22 intoxicated and under the influence, and I don't
23 know what I said, if I said anything.

~~A-123~~

A-71 #

SHEILA A. DOUGHERTY
Official Court Reporter

Quentin Henry - Cross

1 Q. You agree you remember making the
2 statement though?

3 A. I don't remember -- I was drunk. And
4 under the influence of marijuana. All I know, I can
5 remember waking up in the cell at the police station
6 and then going to jail. That is all I remember.

7 Q. And so you don't remember denying that you
8 had any involvement in this?

9 A. Nope. I don't remember it.

10 Q. You don't remember doing that?

11 A. (Witness shook head from side to side.)

12 MR. KRINER: Your Honor, at this time I
13 would like to play the defendant's statement.

14 THE COURT: You may. Which exhibit are
15 you referring to?

16 MR. KRINER: May I have a moment?

17 THE COURT: You are talking about the tape
18 of the witness?

19 MR. KRINER: Yes, sir.

20 THE COURT: You may. Hand the exhibit to
21 the bailiff and he will play it.

22 (Whereupon the tape was played.)

23 MR. KRINER: The State has no further

~~A-72~~
SHEILA A. DOUGHERTY

Official Court Reporter

A-72.

Quentin Henry - Cross

1 questions of this witness.

2 THE COURT: Ms. Dean.

3 REDIRECT EXAMINATION

4 BY MS. DEAN:

5 Q. Mr. Henry, in your life have the police
6 been people who have helped you or have the police
7 been people who did not help you in your life?

8 MR. KRINER: Objection. Relevance.

9 MS. DEAN: We are talking about his
10 statement to the police, Your Honor.

11 THE COURT: I will allow it.

12 BY MS. DEAN:

13 Q. Have the police been your friends or not,
14 generally in your life?

15 A. Well, in my life, I mean, not really, no.

16 Q. No? What do you think would have happened
17 if you had told the police officer what you did that
18 night at Taylor's house?

19 MR. KRINER: Your Honor, I am going to
20 object.

21 THE COURT: The objection is sustained.

22 THE WITNESS: Hum.

23 MS. DEAN: No, no, I will withdraw the

~~A-73~~

Quentin Henry - Redirect

1 question.

2 BY MS. DEAN:

3 Q. Why did you lie to the police?

4 A. Because I was afraid of the consequence,
5 whatever would happen to me.

6 Q. Okay.

7 MS. DEAN: No other questions, Your Honor.

8 THE COURT: Mr. Kriner.

9 RECROSS-EXAMINATION

10 BY MR. KRINER:

11 Q. Mr. Henry, do you remember a few minutes
12 ago when I was up here asking you questions?

13 A. Yes, sir.

14 Q. And I asked you questions about your
15 statement?

16 A. Yes, sir.

17 Q. Do you remember what your answer was with
18 respect to whether or not you remembered even making
19 the statement?

20 A. I said I wasn't sure if I made a
21 statement.

22 Q. And you just said in response to
23 Ms. Dean's question that you lied to the police when

A-74

SHEILA A. DOUGHERTY
Official Court Reporter

A-74. #

Quentin Henry - Recross

1 you made the statement?

2 A. Yeah, because it is clear that on the tape
3 I lied, but I am quite sure that I know that if I
4 lied it was because I was protecting myself from a
5 consequence.

6 Q. So do you remember now making the
7 statement?

8 A. I am kind of recalling from hearing the
9 tape a little bit, but I was highly intoxicated and
10 drunk, and I mean that is my voice, so I said that,
11 but I don't remember. I can't say I remember saying
12 it, but that is my voice, I had to say it.

13 Q. Well, let's just get to -- the question
14 is: Did you lie to the police or not even remember
15 making the statement to the police, and the
16 statement is the product of you being intoxicated?
17 Which is it?

18 A. Um, I don't remember making the statements
19 to the police, so I can't really remember, but I
20 did, so I would say I lied because I was protecting
21 myself. So I lied, yeah.

22 Q. Okay. So you remember when you made the
23 statement, you were sober enough to try and help

~~A-127~~

A-75. #

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Quentin Henry - Recross

1 yourself out?

2 A. As I recall from the tape, it is evident
3 that I was lying to protect myself, help myself out,
4 so that is how I remember it.

5 Q. We want to know what you remember based --

6 A. I don't actually remember nothing during
7 being questioned by the police because I was highly
8 intoxicated and drunk, so I don't really remember
9 too much.

10 Q. So you didn't lie to the police?

11 A. Well, I really don't know. I was
12 intoxicated. It was evident on the tape that I
13 lied, so that is how I know that I lied because I
14 just heard it.

15 Q. And your testimony today is you lied
16 because that is inconsistent with what you are
17 testifying to here today on the witness stand;
18 correct?

19 A. Correct.

20 MR. KRINER: Nothing further.

21 THE COURT: Ms. Dean.

22 MS. DEAN: No further questions, Your
23 Honor.

A-76

SHEILA A. DOUGHERTY
Official Court Reporter

A-76 #

Carl Humphrey - Direct

1 Investigations Unit.

2 Q. Can you describe what the Criminal
3 Investigations Unit, what their responsibilities
4 are?

5 A. The Criminal Investigations Unit handles
6 all major felonies, crimes such as rapes, homicide,
7 things of that nature.

8 Q. And were you assigned to investigate a
9 home invasion robbery at 34 Heritage Drive?

10 A. Yes, I was.

11 Q. Was that on August 27, 2002?

12 A. Yes, it was.

13 Q. What county and state is that?

14 A. Kent County, State of Delaware.

15 Q. Did you respond to the address?

16 A. Yes, I did.

17 Q. And for what purpose, for what purpose did
18 you respond?

19 A. To investigate a burglary, reported
20 burglary at that time.

-21 Q. Were you assigned as the chief
22 investigating officer?

-23 A. Yes, I was.

~~A-73~~

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A-77. #

Carl Humphrey - Direct

1 Q. And did you learn what time the incident
2 was reported?

3 A. It was reported at approximately quarter
4 to 10:00 in the p.m.

5 Q. Did you enter the residence at 34 Heritage
6 Drive?

7 A. Yes, I did.

8 Q. Can you describe the condition of the
9 residence when you entered it?

10 A. I noticed obvious damage when I entered
11 the door. It was open, the screen door had been --
12 the screen in the screen door had been torn, the
13 door jamb was damaged.

14 Q. Did you have occasion to recover any
15 evidence?

16 A. Yes, I did.

17 Q. Can you describe what evidence you
18 recovered personally?

19 A. I recovered an empty shell casing, and
20 also recovered some bullet fragments from the wall.

21 Q. From where did you recover the shell
22 casing?

23 A. The shell casing was on a table which had

~~A-74~~

SHEILA A. DOUGHERTY
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A-78. #.

Carl Humphrey - Direct

1 been placed there by Sergeant Littlefield, who
2 testified yesterday.

3 Q. And how about the bullet, projectile?

4 A. The projectile was recovered from the wall
5 itself.

6 MR. KRINER: Your Honor, may I retrieve
7 some exhibits?

8 THE COURT: Yes.

9 MR. KRINER: May I approach the witness?

10 THE COURT: Yes.

11 BY MR. KRINER:

12 Q. I am handing you what has been marked for
13 identification as State's Exhibit E and State's
14 Exhibit G. Do you recognize those, sir?

15 A. Yes.

16 Q. What are those?

17 A. This is the shell casing I recovered from
18 the table.

19 Q. That is State's Exhibit G?

20 A. This is E.

21 Q. I am sorry, E?

22 A. State's E. And this one is Exhibit G.

23 These are the bullet fragments that I recovered from.

~~A-75~~

SHEILA A. DOUGHERTY
Official Court Reporter

A-79.#.

Carl Humphrey - Direct

1 A. When I interviewed Mr. Taylor he was sort
2 of in a panic. He appeared to be shaken up.

3 Q. Upset?

4 A. Yes, he was very upset.

5 Q. Do you recall about what time you
6 interviewed him?

7 A. It was after I covered the scene, between
8 10:00, 10:30.

9 Q. And did you ask him what occurred?

10 A. Yes, I did.

11 Q. And did he tell you?

12 A. Yes, he did.

13 Q. And did he tell you who did it?

14 A. Yes, he did.

15 Q. And did he know any of the persons' names?

16 A. Yes, he did know the names.

17 Q. What name did he use?

18 A. He gave me Michael Durham, ^{Perjured} he gave me a
19 nickname of Nugget and a nickname of Peebo.

20 Q. Did you hear his testimony yesterday in
21 Court?

22 A. Yes, I did.

23 Q. Was his testimony consistent with what he

~~ATT~~

A-80.#

SHEILA A. DOUGHERTY
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Carl Humphrey - Direct

1 Q. What is that?

2 A. That is the handgun I recovered from the
3 lock box at the Dover Police Station.

4 Q. From Officer Knight?

5 A. Yes.

6 MR. KRINER: Your Honor, I have no further
7 questions.

8 THE COURT: You may cross-examine.

9 CROSS-EXAMINATION

10 BY MS. DEAN:

11 Q. Good morning.

12 A. Good morning, Ms. Dean.

13 Q. Are you the lead investigator? You are
14 the investigating officer in this case?

15 A. That's correct.

16 Q. Is it part of your job to summarize or
17 evaluate all the evidence?

18 A. Yes, it is.

19 Q. Were any fingerprint analysis taken at the
20 scene?

21 A. No.

22 Q. None from the door?

23 A. No.

~~A-79~~

SHEILA A. DOUGHERTY

Official Court Reporter

A-82

Carl Humphrey - Cross

1 Q. Front door? Back door? None?

2 A. No.

3 Q. Okay. Did your investigation reveal how
4 the blood got on the curtain by the back door?

5 A. No. I asked about that. Mr. Taylor
6 couldn't remember.

7 Q. Who couldn't remember?

8 A. Mr. Taylor.

9 Q. What about Mr. Taylor? Did he remember?

10 A. No.

11 Q. No? Okay. Was that blood or any blood in
12 the house analyzed to see if it was the same blood
13 here or there? Was any analysis done of blood?

14 A. No. There was no need to analyze the
+15 blood.

16 Q. Okay. Now, there were two, actually three
17 children present in the home; is that correct?

18 A. Yes.

19 Q. When this happened? And two of them were
20 like ten and 11 years old?

21 A. One was ten, the other one was probably a
22 little bit older.

23 Q. Were the children interviewed?

~~A-80~~

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A-83.#.

Carl Humphrey - Redirect

1 A. No, I wouldn't have done that.

2 Q. Okay. So I guess my question is: Did
3 Mr. Taylor inform you that Durham was the assailant
4 before you informed him that it was an arrest?

5 A. That's correct, that's correct. *Perjured*

6 MR. KRINER: I have no further questions.

7 THE COURT: Ms. Dean.

8 RECROSS-EXAMINATION

9 BY MS. DEAN:

+10 Q. Officer, just to clarify, is it correct
11 that you testified that you do not remember whether
12 or not you told Mr. Taylor that Mr. Durham had been
13 arrested?

14 A. That's correct. That is what I testified
15 to.

16 Q. So you don't remember if you told him at
17 all, before, after, or ever?

+18 A. That's correct.

19 MS. DEAN: Okay. No questions, Your
20 Honor.

21 THE COURT: Mr. Kriner.

22

23

A-84. #

* * * * *

Whereupon,

SHIRLEY RILEY,

was called as a witness and, having been first duly sworn, was examined and testified as follows:

THE COURT: Good afternoon, Ms. Riley.

THE WITNESS: Good afternoon.

THE COURT: The reason that we have had you come back to the courthouse is because a motion for a new trial has been made and issues have been raised regarding your attentiveness and even the suggestions and evidence from some observers who believe you were sleeping during the course of the trial.

First of all, can you tell me how old you are?

THE WITNESS: 67.

THE COURT: And are you employed today?

THE WITNESS: No.

THE COURT: During the time of the trial were you employed?

THE WITNESS: No.

THE COURT: Were you getting regular

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~~A-134~~

A-85. #

1 sleep each day?

2 THE WITNESS: Enough.

3 THE COURT: Specifically, there is an
4 allegation that you were observed with your eyes
5 being closed and then you would catch yourself and
+6 open your eyes. Do you recall dozing at all during
7 the trial?

8 THE WITNESS: That could have happened,
9 but the juror next to me would nudge me. But I was
- 10 not fully asleep, no. All closed eyes are not
+11 asleep.

12 THE COURT: And was this juror --
13 basically, how often would that happen, that he
14 nudged you?

15 THE WITNESS: Actually, it really didn't
16 happen. He said that at one time he started to,
17 but it really didn't happen.

18 THE COURT: At what point in the trial
19 did that happen, do you recall?

20 THE WITNESS: No, I don't recall. I --
21 no. It was probably the first day.

22 THE COURT: Well, were you sleeping or
23 not?

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~~A-135~~

A-86.#

1 THE COURT: He's referring to Monday,
2 December 1st, so that's consistent with what you
3 said?

4 THE WITNESS: Yes.

5 THE COURT: He next says, "I also
6 observed her dozing on Wednesday, December 3rd --"

7 THE WITNESS: I don't think so.

+ 8 THE COURT: He next says, "During the
9 reading of the jury instructions, it was obvious
10 that she was struggling to stay awake. Her eyes
11 would close, flutter open and then close again.
12 Then flutter open again. I could tell she was
13 fighting sleep. I did not count the number of
14 times this happened, but I can estimate that it was
+ 15 four times."

16 THE WITNESS: Now, can you read the very
17 first part again?

18 THE COURT: "During the reading of the
19 jury instructions --"

20 THE WITNESS: Okay.

21 THE COURT: "-- it was obvious she was
22 struggling to stay awake, her eyes would close,
23 flutter open, then close again and then flutter

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Official Court Reporter

~~A-131~~
A-87.#

1 sleep each day?

2 THE WITNESS: Enough.

3 THE COURT: Specifically, there is an
4 allegation that you were observed with your eyes
5 being closed and then you would catch yourself and
6 open your eyes. Do you recall dozing at all during
7 the trial?

8 THE WITNESS: That could have happened,
9 but the juror next to me would nudge me. But I was
10 not fully asleep, no. All closed eyes are not
11 asleep.

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13 basically, how often would that happen, that he
14 nudged you?

15 THE WITNESS: Actually, it really didn't
16 happen. He said that at one time he started to,
17 but it really didn't happen.

18 THE COURT: At what point in the trial
19 did that happen, do you recall?

20 THE WITNESS: No, I don't recall. I --
21 no. It was probably the first day.

22 THE COURT: Well, were you sleeping or
23 not?

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Official Court Reporter

~~A-135~~

A-88 #.

1 THE WITNESS: No.

2 THE COURT: Were there times that you
3 were listening with your eyes closed or --

4 THE WITNESS: Yes.

5 THE COURT: How often did that happen?

6 THE WITNESS: Not often.

7 THE COURT: If there was any point in
8 time when you had to be nudged or you closed your
9 eyes, how long would that have lasted?

- 10 THE WITNESS: One or two seconds.

11 THE COURT: Do you consider that you
12 were attentive or not attentive as a juror?

13 THE WITNESS: I was attentive. Very
14 attentive.

15 THE COURT: I have an affidavit from
16 Mr. Mizell who says that, "On Monday, December 1st,
17 I noticed during the trial the juror's eyes were
18 closed and she would catch herself and open her
19 eyes and come back to attention."

20 THE WITNESS: Who is Mr. Mizell?

21 THE COURT: He apparently was a
22 spectator in the courtroom.

23 THE WITNESS: Okay.

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Official Court Reporter

~~D-1376~~

A-89. #

1 THE COURT: He's referring to Monday,
2 December 1st, so that's consistent with what you
3 said?

4 THE WITNESS: Yes.

5 THE COURT: He next says, "I also
6 observed her dozing on Wednesday, December 3rd --"

7 THE WITNESS: I don't think so.

8 THE COURT: He next says, "During the
9 reading of the jury instructions, it was obvious
10 that she was struggling to stay awake. Her eyes
11 would close, flutter open and then close again.
12 Then flutter open again. I could tell she was
13 fighting sleep. I did not count the number of
14 times this happened, but I can estimate that it was
15 four times."

16 THE WITNESS: Now, can you read the very
17 first part again?

18 THE COURT: "During the reading of the
19 jury instructions --"

20 THE WITNESS: Okay.

21 THE COURT: "-- it was obvious she was
22 struggling to stay awake, her eyes would close,
23 flutter open, then close again and then flutter

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Official Court Reporter

~~A-137~~
A-90.#

1 open again. I could tell she was fighting sleep.
2 I did not count the number of times that this
3 happened, but I can estimate that it was four
4 times."

5 THE WITNESS: Can I say something
6 at this point?

7 THE COURT: Yes. That's why I'm --

8 THE WITNESS: The instructions to the
9 jury was in writing; is that correct?

- 10 THE COURT: Yes.

11 THE WITNESS: And something like 43
12 pages?

13 THE COURT: Yes.

14 THE WITNESS: And we went over those
15 pages. I'm not saying that -- what I am saying is
16 that even if that happened, which I don't remember
17 it happening, it was in writing for me to read.

18 THE COURT: And did you read the
19 instructions?

20 THE WITNESS: Yes, I remember the
21 instructions. I remember both lawyers going
22 through the instructions with you, and none of the
23 lawyers made any objections.

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Official Court Reporter

~~A-38~~
A-91.#

1 THE COURT: The affidavit of Mr. Mizell
2 goes on to say, "Also, during Mr. Kriner's closing
3 statement --" that's the prosecutor, Mr. Kriner,
4 "-- she was dozing. It happened twice that I am
5 sure of, or possibly more."

6 THE WITNESS: I'm sorry?

7 THE COURT: Go ahead.

8 THE WITNESS: If I dozed, it was the
9 first day. If I dozed.

10 THE COURT: I have an affidavit of Beth
11 Savitz who is an attorney and she says, in
12 pertinent part, as follows: She was present in the
13 courtroom during opening statements and
14 direct-examinations of the first two witnesses in
15 the trial. She observed a juror in the front row,
16 a black female sitting with her eyes closed and her
17 chin to her chest. This juror appeared to be
18 dozing off and on during this time.

19 THE WITNESS: I dozed off in the large
20 courtroom, before the jurors were picked.

21 THE COURT: Do you have any sleeping
22 disorders of any kind?

23 THE WITNESS: Umm, no, I don't. I have

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Official Court Reporter

~~A-139~~

A-92#.

1 weird sleeping hours, but I don't have any sleeping
2 disorders.

3 THE COURT: Do you, at times, place your
4 chin down to your chest as you are listening to
5 things?

6 THE WITNESS: Oh, I never paid any
7 attention to that. It depends on how, if it's
8 quite serious, I might put my head down to my
9 chest, if it's serious as to what I'm listening to.

10 THE COURT: Did you understand and
11 comprehend all of the evidence --

12 THE WITNESS: Yes.

13 THE COURT: -- and arguments in this
14 case?

15 THE WITNESS: Yes, yes.

16 THE COURT: Did you comprehend and
17 understand the Court's instructions?

18 THE WITNESS: Yes.

19 THE COURT: If you will step outside to
20 the corridor for a moment, please?

21 * * * * *

22 (Whereupon, the juror exited the
23 courtroom.)

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Official Court Reporter

~~A-140~~
A-93 #

1 * * * * *

2 THE COURT: Counsel, do you have any
3 additional inquiries to suggest?

4 MR. KRINER: Not from the State, Your
5 Honor.

6 MS. DEAN: Just one thing, Your Honor.
7 She testified, "I have weird sleeping hours." I
8 just wondered if the Court would follow-up a little
9 bit more on that to find out what her sleeping
- 10 hours were during the trial.

11 THE COURT: All right. Bring her back
12 in.

13 * * * * *

14 (Whereupon, the juror entered
15 the courtroom.)

16 * * * * *

17 THE COURT: I want to follow-up on your
18 statement. You referred to having weird sleeping
19 hours.

20 THE WITNESS: Hm-mm.

21 THE COURT: What do you mean by that?

22 THE WITNESS: I sleep whenever. Well,
23 from, I need to go back a long time, I'm 67 years

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~~A-144~~

A-94. #

1 old.

2 THE COURT: All right.

3 THE WITNESS: And my mother told me as
4 an infant sometimes she would put me to bed and
5 check on me when she would go to bed and I would be
6 awake. So normally, I just get my sleep whenever I
7 can. So that's probably why I got my few minutes
8 in before the jury was selected.

9 THE COURT: All right. And what was
10 your sleeping pattern during the time of this
11 trial -- which I'll remind you that the trial began
12 December 1st, 2003, and the jury was instructed on
13 December 3rd, 2003 -- what were your sleeping
14 patterns then?

15 THE WITNESS: As usual, I go to bed very
16 late. But I've been the kind who can get up
17 any time if I have to and do what I have to do.
18 But if there's a period in between where I can
19 catch ten or fifteen minutes, I'll do that, but not
20 at a pertinent time.

21 THE COURT: All right. You were asked
22 during the selection process in this case if, along
23 with all the other jurors, if you had any mental or

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~~A-1462~~

A-95. #

1 physical disability that would prevent you from
2 performing satisfactory jury service.

3 THE WITNESS: Yes.

4 THE COURT: Did you have any such mental
5 or physical disability?

6 THE WITNESS: No, no.

7 THE COURT: Please step out to the
8 corridor again.

9 * * * * *

- 10 (Whereupon, the juror exited the
11 courtroom.)

12 * * * * *

13 THE COURT: Counsel, any other questions
14 to suggest?

15 MR. KRINER: No, Your Honor.

16 MS. DEAN: No, Your Honor. *should have called*
juror that nudged her.

17 THE COURT: All right. I'm going to
18 have her stay until we hear from the rest of the
19 witnesses, in case there are other questions that
20 might be suggested after hearing them.

21 Have Ms. Savitz come in, please.

22 * * * * *

23 Whereupon,

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~~A-143~~

A-96. #

1 BETH SAVITZ,
2 was called as a witness and, having been first duly
3 sworn, was examined and testified as follows:

4 THE COURT: Good afternoon, Ms. Savitz.

5 THE WITNESS: Good afternoon, Your
6 Honor.

7 THE COURT: I have your affidavit where
8 you refer to being present during the opening
9 statements and direct-examinations of the first two
10 witnesses in State versus Michael Durham.

11 Would you tell me what you recall observing.

12 THE WITNESS: With respect to the juror?

13 THE COURT: Yes.

14 THE WITNESS: It's an older black woman
15 sitting in the front row, wearing a red sweater,
16 sweatshirt, something, it was red. And I don't
17 remember exactly when, but while we were sitting
18 there, she would sort of put her head down and she
19 appeared to be dozing. I can't tell you for sure
20 that she was, but she was sitting with her eyes
21 closed. I remember having a conversation with
22 another spectator to the effect of: Do you think
23 she's sleeping?

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~~A-97~~

A-97. #.

1 THE COURT: Was that Mr. Mizell or
2 somebody else?

3 THE WITNESS: I think that's Mr. Mizell,
4 if he's the gentleman in the hallway.

5 THE COURT: All right.

6 THE WITNESS: That really -- I was there
7 for the first witness that Mr. Kriner called. It
8 was the female doctor from the ER, and then
9 Mr. Durham -- I mean, I'm sorry, the alleged victim
10 testified, and then I left. So I wasn't in there a
11 whole long time.

12 THE COURT: Your affidavit says, "She
13 observed a juror in the front row, a black female
14 sitting with her eyes closed and her chin to her
15 chest." Is that what you are telling me today?

16 THE WITNESS: Yes, Your Honor.

17 THE COURT: All right. How long were
18 her eyes closed?

19 THE WITNESS: I don't know. I didn't
20 look at a clock. I don't know how long I was in
21 there. I know I was there for both opening
22 statements, the testimony of the ER doctor, and the
23 direct or parts of the direct of the alleged

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~~A-145~~
A-98. #.

1 victim. But it wasn't, I didn't look at the juror
2 the whole time. I mean, it wasn't just for a split
3 second.

4 THE COURT: Do you have any estimate as
5 to how long it was?

6 THE WITNESS: No, I do not. I know I
7 looked over more than once.

8 THE COURT: Anything else you can recall
9 on the issue of this juror being inattentive or
10 dozing?

11 THE WITNESS: That's it, Your Honor.

12 THE COURT: If you would step out to the
13 corridor, please.

14 THE WITNESS: Thank you.

15 * * * * *

16 (Whereupon, the witness exited
17 the courtroom.)

18 * * * * *

19 THE COURT: Counsel, do you have any
20 additional questions to suggest?

21 MS. DEAN: No, Your Honor.

22 MR. KRINER: Your Honor, I guess the
23 question the State would have, since she's an

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~~7/14/07~~
A-99. #.

1 attorney, whether or not she brought this to either
2 of the attorneys' attention at the time, whether
3 she brought anything else to the attention of
4 either the attorneys, and why this wasn't one of
5 the things? For example, I believe, I have some
6 information that she was providing notes to
7 Ms. Dean during a portion of the trial. This would
8 seem like something, as an officer of the Court,
9 she should have brought to the attention.

10 THE COURT: All right. Bring her back
11 in.

12 * * * * *

13 (Whereupon, the witness reentered the.
14 courtroom.)

15 * * * * *

16 THE COURT: Have a seat. When did you
17 first bring this to the attention of Ms. Dean?

18 THE WITNESS: I think it was the day
19 their verdict came in.

20 THE COURT: And do you have any
21 explanation why you didn't bring it to anyone's
22 attention when you observed it?

23 THE WITNESS: No.

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~~A-100~~

A-100. #

1 THE COURT: When you brought it to
2 Ms. Dean's attention, did you do that by a note or
3 orally, or how was that done?

4 THE WITNESS: I think we were standing
5 in Courtroom 2, actually, when I told -- excuse me,
6 sorry. I think I heard somebody say something. I
7 said, "Yeah, I saw her. Was it the lady sitting
8 down front?"

9 THE COURT: Okay.

10 THE WITNESS: And I described her.

11 THE COURT: Were you at any time passing
12 notes to Ms. Dean during the trial of this case?

13 THE WITNESS: I wrote a note. I did not
14 pass it to her and it had nothing to do with the
15 juror.

16 THE COURT: All right. Did it have to
17 do with the trial, or the case?

18 THE WITNESS: Yes.

19 THE COURT: Strategy or something of
20 that sort?

21 THE WITNESS: It was a thought that
22 popped in my head when somebody had asked a
23 question about the identity of the defendant, and I

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~~A-148~~

A-101. #.

1 thought of a question that she might want to ask.

2 THE COURT: All right. Did you
3 represent any of the parties involved in this case?
4 Why were you present?

5 THE WITNESS: Because I hadn't seen
6 Mr. Kriner's opening statement before and I was
7 supposed to have a trial starting with him two
8 weeks later, and I wanted to see what his opening
9 sounded like.

10 THE COURT: Please step out to the
11 corridor again.

12 * * * * *

13 (Whereupon, the witness left the
14 courtroom.)

15 * * * * *

16 THE COURT: Any other questions for this
17 witness?

18 MR. KRINER: No, Your Honor.

19 MS. DEAN: Your Honor, I have no other
20 questions for the witness, but I would like to put
21 on the record about the note. Would you permit
22 that briefly?

23 THE COURT: All right.

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~~A-102~~

A-102 #

1 MS. DEAN: During the direct-examination
2 of the alleged victim, Ms. Savitz was sitting in
3 the back of Courtroom 2 and she kind of tried to
4 get my attention. And I think she gave me a note,
5 but I'm not positive that she actually gave me the
6 note. But she wanted to suggest to me that I
7 should ask the victim if the person who did this
8 had any tattoos; and she suggested to me that that
9 would be a good question to ask. That's what that
10 was about.

11 THE COURT: All right. You asked that
12 question, didn't you?

13 MS. DEAN: Yes. I took her suggestion,
14 Your Honor.

15 THE COURT: Anything else, Mr. Kriner?

16 MR. KRINER: No, Your Honor.

17 THE COURT: All right. Have Leroy Poore
18 come in, please.

19 * * * * *

20 Whereupon,

21 LEROY POORE,
22 was called as a witness and, having been first duly
23 sworn, was examined and testified as follows:

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~~A-150~~

A-103.#

1 THE COURT: Good afternoon, Mr. Poore.

2 THE WITNESS: Good afternoon, Judge.

3 THE COURT: Or I will say Corporal

4 Poore. I have an affidavit that you have filed

5 which reads, "I was present in the courtroom during

6 the trial of State versus Michael Durham." And

7 then in the typewritten portion it says, "I

8 observed Juror Number 9 was not attentive and

9 nodding in and out." That is stricken through and

10 it's handwritten, "I put a line through this

11 sentence because I neither typed or said this

12 statement. My main concern, focus and attention

13 was towards that of the inmate at the defense table

14 on trial, foremost for security reasons."

15 I understand that. Did you observe

16 Juror Number 9 as being nodding or inattentive in

17 addition to your other duties?

18 THE WITNESS: No, sir, I hadn't. I

19 don't know what went on with Juror Number 9. I

20 have no knowledge of whether she was or whether she

21 wasn't nodding. My main focus and attention was

22 towards that of the inmate, Inmate Michael Durham.

23 THE COURT: All right. Do you have any

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~~A-15~~

A-104. #

1 explanation why you were asked to give an
2 affidavit?

3 THE WITNESS: I have none. We were by
4 the soda machines, the coke machines, I came out of
5 the bathroom, another officer and myself, the other
6 officer was the one that was saying a few things or
7 whatever. And I don't know, Sandy turned around
8 and looked at me -- or Ms. Dean did. I didn't
9 say -- I did not write that and they weren't my
10 words. That's as to why I marked through them and
11 initialed it.

12 THE COURT: All right. What was the
13 other officer's name?

14 THE WITNESS: Corporal Gregory
15 Alexander.

16 THE COURT: What did he say?

17 THE WITNESS: He was just talking about
18 he was noticing Juror Number 9.

19 THE COURT: Okay. And did he say that
20 he saw she was nodding in and out, or something to
21 that effect?

22 THE WITNESS: I really can't recall
23 right now, to be honest with you. I can't really

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~~A-105~~
A-105.#

1 recall what he said.

2 THE COURT: All right. Please step out
3 to the corridor again.

4 * * * * *

5 (Whereupon, the witness exited the
6 courtroom.)

7 * * * * *

8 THE COURT: Counsel, do you have any
9 additional questions to suggest?

- 10 MR. KRINER: No, Your Honor.

11 THE COURT: Ms. Dean?

12 MS. DEAN: Your Honor, I would
13 appreciate it if you would ask Mr. Poore if he
14 recalls my asking him what he observed, and if he
15 recalls at the very moment he told me, that I stood
16 there and wrote down what he said, if he recalls
17 that happening? I believe that happened in
18 Courtroom 2. And I've mentioned in my affidavit
19 about that. I'd appreciate if the Court would ask
20 him if he recalls me writing down what he said.

21 THE COURT: All right. Bring him back
22 in.

23 * * * * *

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~~A-153~~

A-106.[#]

1 (Whereupon, the witness reentered the
2 courtroom.)

3 * * * * *

4 THE COURT: Do you recall having any
5 conversations with Ms. Dean in Courtroom Number 2?

6 THE WITNESS: Yes, I do.

7 THE COURT: And do you recall her asking
8 you what you observed?

9 THE WITNESS: No. We had made a
10 comment, or she had made a comment -- a few people
11 were talking and cutting up, or whatever, and they
12 were teasing Mr. Kriner. And I think I made a
13 comment, I said, "Whether or not she was sleeping,"
14 I said, "The only two people that surely would know
15 whether she was nodding or not, should have been
16 the people who were addressing her when giving
17 their closing statements," and that was Ms. Dean
18 and Mr. Kriner. That's all I said.

19 THE COURT: Do you recall Ms. Dean
20 writing anything down as you were speaking?

21 THE WITNESS: I don't know if she was or
22 not, sir.

23 THE COURT: All right. Was there some

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~~A-107~~
A-107 #

1 effort at humor about Mr. Kriner putting jurors to
2 sleep or something; is that what you are referring
3 to?

4 THE WITNESS: Just a few cut-ups being
5 made and everything, including myself were making
6 comments. Other than that, no.

7 THE COURT: All right. Please step out
8 to the corridor again.

9 * * * * *

- 10 (Whereupon, the witness exited the
11 courtroom.)

12 * * * * *

13 THE COURT: Any other questions for this
14 witness?

15 MR. KRINER: No, Your Honor.

16 MS. DEAN: No, Your Honor.

17 THE COURT: All right. Bring in
18 Mr. Mizell.

19 Any objection to Ms. Savitz and
20 Mr. Poore being excused?

21 MR. KRINER: Not from the State, Your
22 Honor.

23 MS. DEAN: No, Your Honor.

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~~A-155~~
A-108. #

1 * * * * *

2 Whereupon,

3 WILLIAM MIZELL,

4 was called as a witness and, having been first duly
5 sworn, was examined and testified as follows:

6 THE COURT: Good afternoon, Mr. Mizell.

7 THE WITNESS: Good afternoon.

8 THE COURT: I have some questions for
9 you as a follow-up to the affidavit that you've
10 filed on or completed on December 5th, 2003,
11 regarding the trial, State versus Michael Durham.
12 How much of the trial did you attend?

13 THE WITNESS: All of it.

14 THE COURT: Was there any particular
15 reason you attended the whole trial?

16 THE WITNESS: I'm retired and that's
17 what I do. I come down and observe all, a lot of
18 different trials.

19 THE COURT: What was your occupation
20 before you retired?

21 THE WITNESS: I was a construction
22 superintendent.

23 THE COURT: How old are you today?

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~~A-109~~
A-109.#

1 THE WITNESS: 62.

2 THE COURT: Can you tell me what you
3 observed of the juror?

4 THE WITNESS: Yes. The first day of the
5 trial, we were, I think it's Courtroom 2, I'm not
6 sure of the numbers, the one across the way here.

7 THE COURT: That's Courtroom 2.

8 THE WITNESS: That's where the first day
9 was. And I was sitting there, it was warm in
10 there. And I happened to notice that there was a
11 black woman in the front row, and I happened to
12 notice that she was really struggling. She was
13 struggling, and all through the whole thing.
14 We had a couple of jurors that were dismissed.

15 At the end of the day, I went home and
16 when I came back the next day, we were over here,
17 and she was sitting in the front row there and she
18 was doing the same thing. She never actually went
19 to sleep, but she was struggling with sleep I guess
20 like a baby would do, I guess. And then the third
21 day we were in here when you were giving your
22 instructions to the jury, it was -- she was really
23 having a hard time. And when Mr. Kriner gave his

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~~A-110~~
A-110.#

1 closing statement and Ms. Dean gave her closing
2 statements, she was struggling. She didn't go to
3 sleep, but she was struggling. She was fighting
4 sleep hard.

5 THE COURT: And when did you bring this
6 to the attention of Ms. Dean?

7 THE WITNESS: Well, it wasn't actually
8 to Ms. Dean. I was talking to Mr. Schwartz, Ben
9 Schwartz. He did a -- he prepared some wills for
10 me, and I mentioned to him that one of the jurors
11 in the trial I was watching -- he had a trial
12 across in the other room -- and I mentioned to him
13 the juror was really, really struggling with sleep
14 all the way through the trial. And he's the one
15 who took my affidavit. I never did actually talk
16 to Ms. Dean.

17 THE COURT: All right. If you will
18 please step out to the corridor for a moment?

19 * * * * *

20 (Whereupon, the witness exited the
21 courtroom.)

22 * * * * *

23 THE COURT: Counsel, do you have any

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~~4158~~

A-111.#.

1 THE COURT: Counsel, do you have any
2 other questions to suggest or ask of Mr. Mizell?

3 MR. KRINER: No, Your Honor.

4 MS. DEAN: No, Your Honor.

5 THE COURT: Do we have any other
6 questions to suggest, in view of the testimony, of
7 Ms. Riley, the juror?

8 MR. KRINER: Not from the State, Your
9 Honor.

- 10 MS. DEAN: No, Your Honor.

11 THE COURT: All right. Madam Bailiff,
12 if you could inform both of them that they are
13 excused.

14 Counsel, will there be any additional
15 evidence? Do you see the need for any additional
16 evidence?

17 MR. KRINER: No, Your Honor.

18 MS. DEAN: No, Your Honor.

19 THE COURT: I'm going to allow you to
20 submit written memos in support of your respective
21 positions. Come to sidebar, we will discuss the
22 scheduling of that.

23 * * * * *

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~~A-112~~
A-112. #

1 (Whereupon, a discussion at sidebar
2 occurred, off the record, at the
3 conclusion of which, the following
4 occurred in open court:)

5 * * * * *

6 THE COURT: Counsel, as discussed at
7 sidebar, the defendant's letter memorandum may be
8 filed by Friday, January 16th. The State may
9 answer by Friday, January 30th, and the defendant
10 may reply by Friday, February 6th.

11 Anything else today?

12 MR. KRINER: No, Your Honor.

13 MS. DEAN: No, Your Honor.

14 THE COURT: Court is now adjourned.

15 * * * * *

16 (Whereupon, the matter was adjourned
17 and reconvened at 4:34 o'clock p.m. the same
18 day.)

19 * * * * *

20 THE COURT: Counsel, I asked you earlier
21 whether there was any additional evidence, and I've
22 since been approached with a suggestion that I call
23 an additional witness.

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~~ATL~~

A-113.#.

1 Mr. Kriner, is that your application?

2 MR. KRINER: Yes, Judge. Joe Sanchez.

3 THE COURT: Any objection, Ms. Dean?

4 MR. KRINER: Well, he was present, so I
5 don't think I can object to you calling him.

6 THE COURT: All right. Bring him in.

7 * * * * *

8 Whereupon,

9 JOSEPH SANCHEZ,

10 was called as a witness and, having been first duly
11 sworn, was examined and testified as follows:

12 THE COURT: Mr. Sanchez, can you state
13 your employment for the record?

14 THE WITNESS: Superior Court bailiff.

15 THE COURT: Do you have information
16 regarding the jury service of Shirley Riley, Juror
17 Number 9, in the State versus Michael Durham trial
18 that was tried between December 1st and
19 December 3rd, 2003?

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: What information is that?

22 THE WITNESS: I noticed on the first day
23 of trial when we were in Courtroom Number 2 that

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Official Court Reporter

~~1165~~

A-114.#

TABLE OF CONTENTS

TABLE OF CITATIONS	i
NATURE AND STAGE OF PROCEEDINGS	1
SUMMARY OF ARGUMENTS	3
STATEMENT OF FACTS	4
ARGUMENT	
I. THE COURT ABUSED ITS DISCRETION BY DENYING DURHAM'S MOTION FOR A MISTRIAL OR A NEW TRIAL DUE TO A SLEEPING OR INATTENTIVE JUROR.	9
CONCLUSION	14
<u>Exhibits:</u>	
<u>State v. Witherspoon</u> , 1999 WL 744429 (Del. Super.) Exhibit "A"	

A-115. #

1 were there other officers there or just the one?

2 A. There was other ones there.

3 Q. All right. Did you tell anyone --
4 before you got in the ambulance, did you tell
5 anyone who had done this?

6 A. I can't recall.

7 Q. Okay. So you recall telling
8 Detective Humphrey when you got -- when he came to
9 see you at the hospital; was that your testimony?

- 10 A. That's what I said, yes.

11 Q. All right. But you don't recall telling
12 anybody at the scene?

13 A. (No response.)

14 Q. Did Detective Humphrey tell you that
15 they had found Mr. Durham at some other location?

16 A. I can't recall that.

17 Q. You don't remember that?

18 A. (No response.)

19 Q. Okay. You testified that you had been
20 convicted in the past of forgery in the second
21 degree?

22 A. Yes.

23 Q. Was that for signing somebody else's

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~~Atty~~
A-116.#